83-576

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

In re AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner

PETITION FOR A WRIT OF MANDAMUS TO THE HONORABLE PIERCE LIVELY, CHIEF JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

When 5 of the 9 circuit judges of a circuit in regular active service who are qualified to participate in a case vote to rehear a case in banc, the 10th active circuit judge being disqualified, is the party seeking a rehearing entitled to a rehearing in banc?

The parties to the proceedings in the United States Court of Appeals for the Sixth Circuit, No. 80-1476, are:

Ruby Clark, Plaintiff-Appellant;

American Broadcasting Companies, Inc., Defendant-Appellee.

Although petitioner is a corporation, it has no parent companies, no subsidiaries other than those wholly owned by petitioner and no "affiliates" other than two individuals, Leonard H. Goldenson, Chairman of the Board, and Elton H. Rule, Vice-Chairman, who, by reason of their stock ownership in and management positions with petitioner, are treated by petitioner as its "affiliates" for purposes of compliance with the regulations promulgated under the Securities Act of 1933.

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Petitioner, American Broadcasting Companies, Inc., respectfully prays that a writ of mandamus issue from this Court to the Honorable Pierce Lively, Chief Judge of the United States Court of Appeals for the Sixth Circuit, to show cause on a day to be fixed by this Court why mandamus should not issue from this Court directing said Honorable Pierce Lively both to vacate, recall and expunge from the record the Judgment of said Court of Appeals issued as a mandate on November 11, 1982, the Order Denying Petition for Rehearing filed on November 3, 1982 and the order of October 22, 1982 denying the suggestion for rehearing in banc, and also to reinstate the order of September 21, 1982 granting a rehearing in banc, vacating the decision and judgment of the Court of Appeals filed July 29, 1982 and restoring the case of Ruby Clark, Plaintiff-Appellant, v. American Broadcasting Companies, Inc., Defendant-Appellee, Docket No. 80-1476, to the docket of said Court of Appeals as a pending appeal to be heard in banc.

PROCEEDINGS BELOW

Ruby Clark commenced this case in the Circuit Court for the County of Wayne, Michigan on April 19, 1978. Petitioner removed the lawsuit to the United States District Court for the Eastern District of Michigan, Southern Division, pursuant to 28 U.S.C. §§1441-1446.

On May 16, 1980, the district court rendered its opinion granting the motion of petitioner for summary judgment, an opinion set forth at Appendix B to this petition, *infra*, at 36a. The order of dismissal, Appendix C, *infra*, at 46a, was entered on May 30, 1980.

On July 29, 1982, by a 2-to-1 vote, the Court of Appeals for the Sixth Circuit reversed and remanded the case. Appendix A, *infra*, at 1a; *Clark* v. *American Broadcasting Companies, Inc.*, 684 F.2d 1208 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 1433 (1983).

Petitioner applied for rehearing on August 10, 1982, suggesting the appropriateness of review in banc. On September 21, 1982, the Court of Appeals entered its order, Appendix E, *infra*, at 50a, granting a rehearing of this case in banc, noting that a "majority of the Judges of this Court in regular service have voted for rehearing of this case en banc."

On October 22, 1982, the Court of Appeals, acting through the Chief Judge, reversed its grant of in banc review, noting that the 5-to-4 vote in favor of in banc rehearing "(one active judge being disqualified) failed to attain the 6 affirmative votes required to constitute 'a majority of the [10] circuit judges who [were] in regular active service'. . . ." Appendix F, *infra*, at 51a. The petition for rehearing was referred to the panel that originally heard the appeal, which panel rejected the petition by a 2-to-1 vote on November 3, 1982, Appendix G, *infra*, at 52a. The Court's mandate issued November 11, 1982. Appendix D, *infra*, at 48a.

Petitioner timely filed its Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, which was docketed in this Court on January 31, 1983 as No. 82-1288. On March 21, 1983, this Court entered its order denying that petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1651(a).

STATUTES INVOLVED

28 U.S.C. §46(c):

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service.

28 U.S.C. §47:

> No judge shall hear or determine an appeal from the decision of a case or issue tried by him.

28 U.S.C. §455(a):

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. §455(b):

> See Appendix H, *infra*, at 53a.

28 U.S.C. §1651(a):

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

This is a libel and invasion of privacy action brought by Ruby Clark ("Clark"), a Detroit, Michigan housewife, against petitioner, American Broadcasting Companies, Inc. ("ABC"), a corporation incorporated under the laws of, and maintaining its principal place of business in, the State of New York. The action arises out of the ABC News documentary "Sex for Sale, The Urban Battleground." The documentary reported the alarming upsurge of street prostitution in American cities and challenged the widespread contention that prostitution is a "victimless crime" (J.A.[1] 47a, 69a).

During 1976-1977, ABC News investigated the devastating impact of sex-related businesses on urban areas, the public outcry against these businesses and the steps taken by various cities to combat their spread. The results of this investigation were included in the documentary broadcast on April 22, 1977. It reported:

> This is a report about the damage . . . sex businesses do to America's cities . . . and to its neighborhoods.
>
> * * *
>
> It is about the battles being waged in almost every city and community against sex business blight . . . some victories, and some notable defeats on the battlefields of the cities. [J.A. 47a]

The documentary was based on investigations in various urban centers, including New York, Boston and Detroit. As broadcast it included views of urban areas blighted by sex-related businesses, interviews with affected citizens, public officials and experts and statements by persons who were engaged in sex-related businesses (J.A. 45a-91a).

Acts I and II of the documentary focused on the devastating impact that sex businesses had had on New York

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[1] Citations to "J.A." are to the Joint Appendix filed in the Court of Appeals for the Sixth Circuit. Citations to "Appendix A" or other alphabetically designated appendices refer to the Appendix to this petition.

City's Times Square area. Acts III and IV focused on Detroit and the often pitched battle along its Woodward Corridor between the incumbent, middle-class residents and the sex businesses that threatened to overrun their neighborhoods. The broadcast lauded the "Detroit Plan," which involved both citizen activism and effective zoning regulations in an attempt to control sex businesses. *See, Young* v. *American Mini Theaters Inc.*, 427 U.S. 50 (1976). (J.A. 69a-79a).

It was in the Detroit segment of the report that Ruby Clark, made her sole and very brief appearance. An ABC News crew had filmed Mrs. Clark walking alone along a public sidewalk in Detroit in the fall of 1976 (J.A. 13a). The report used a few seconds of this film in conjunction with correspondent Howard K. Smith's report about the humiliating plight of innocent black female residents of neighborhoods adjacent to areas where street prostitution was flourishing. Specifically, while Mrs. Clark was shown walking along a public street, Smith reported:

> But for black women whose homes were there, the cruising white customers were an especially humiliating experience. [J.A. 73a]

This brief sequence constitutes the sole basis for this action (J.A. 5a-6a). The only reference to Mrs. Clark was the view of her walking by herself along a public street in broad daylight. Mrs. Clark was not identified by name, and she made no comment. The Howard K. Smith narrative that accompanied her image portrayed her and other black housewives in the area as undeserving victims of the blight caused by sex-related businesses (J.A. 73a).[2]

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[2] As noted by the Court of Appeals, Appendix A, *infra*, at 3a; 684 F.2d at 1211,

> Sheri Madison, a black female resident of the neighborhood plagued by prostitution, appeared on the screen seconds after Plaintiff. She stated: "Almost any woman who was black and on the street was considered to be a prostitute herself. And was treated like a prostitute."

For a more extensive description of the pertinent portions of the broadcast, petitioner refers this Court to the cogent comments of Judge Brown in his dissenting opinion, Appendix A, *infra*, at 20a-35a; 684 F.2d at 1219-1226.

On April 19, 1978, almost a year after the broadcast, Clark filed her Complaint in the Circuit Court for Wayne County, Michigan (J.A. 4a). She asserted two claims. First, she claimed that the manner in which the broadcast depicted her, when viewed in conjunction with the commentary that accompanied her image, "insinuated and conveyed the impression that Plaintiff, Ruby Clark, was a common street prostitute." Complaint ¶5. (J.A. 5a). She also claimed that "televising Plaintiff, Ruby Clark, on a street scene, without obtaining her prior written or verbal consent," invaded her privacy. Complaint ¶10. (J.A. 5a-6a).

Petitioner removed the case to the United States District Court for the Eastern District of Michigan, Southern Division (J.A. 1a), pursuant to 28 U.S.C. §§1441-1446, and invoked the diversity jurisdiction of the district court under 28 U.S.C. §1332, based on the diverse citizenship of the parties and Mrs. Clark's claim for damages in excess of $10,000.00.

On February 25, 1980, petitioner moved for summary judgment, asking the district court to view the documentary, review the transcript and determine whether under the controlling Michigan law the broadcast was reasonably capable of conveying the libelous meaning claimed by Mrs. Clark or of invading her privacy.

On May 16, 1980, the district court ruled that the broadcast "Sex For Sale, The Urban Battleground," which the court had viewed in its entirety, "was of public interest" (J.A. 396a; Appendix B, *infra*, at 38a). The district court also stated, "I viewed this portion of the film several times; I could estimate 3 to 4 to 5 times" (J.A. 398a; Appendix B, *infra*, at 40a) and ". . . read and reread the transcript" (J.A. 400a; Appendix B, *infra*, at 40a).

Based on this viewing, the Court held:

> There is nothing in her appearance which would suggest, I think, to the reasonable mind that her activity would, in any way, parallel that of the act of prostitu-

tion, as varied as those acts may be. Thus, I saw nothing offensive; I saw nothing libelous and I saw no invasion of privacy in the act of Mrs. Clark by ABC.

I also read and reread the transcript and especially the narrow portion which focused on Mrs. Clark. I find these to be equally as innocuous.

* * *

I must confess that I have agonized over this because I have attempted to place myself as a viewer looking at the program to determine if Mrs. Clark, under any reasonable criterion, could be viewed as a prostitute. . . . I cannot find any justifiable basis to deny the Defendant's motion. [J.A. 399a-401a; Appendix B, *infra*, at 40a-41a]

An order dismissing the action was entered on May 30, 1980. Appendix C, *infra*, at 46a.

Mrs. Clark appealed to the Court of Appeals for the Sixth Circuit, where, by a vote of 2 to 1, the decision of the district court was reversed. The two-judge majority ruled that the district court judge had applied an incorrect standard in granting summary judgment (Appendix A, *infra*, at 6a-7a; 684 F.2d at 1213) and that the Michigan qualified privilege applicable to publications about matters of public interest and concern did not apply to this case because Mrs. Clark was not the focus of the broadcast. The dissenting judge vigorously disputed both of the majority's holdings, especially the majority's truncation of the Michigan privilege.

Petitioner timely petitioned for rehearing, challenging the two-judge majority's ruling that the Michigan qualified privilege applies only where the plaintiff is the focus of the public interest publication. The petition also suggested the appropriateness of a rehearing in banc to secure uniformity of decisions within the Sixth Circuit because the majority's disposition was in conflict with other recent decisions of the Circuit applying Michigan defamation law.

On September 21, 1982, the Court of Appeals entered its order granting rehearing in banc, Appendix E, *infra*, at 50a, stating:

> A majority of the Judges of this Court in regular service have voted for rehearing in this case en banc.

On October 22, 1982, the Court reversed its September 21, 1982 order, Appendix F, *infra*, at 51a:

> The Chief Judge has now directed me to advise that his ruling was made in error and that in fact the 5-4 vote (one active judge being disqualified) failed to attain the 6 affirmative votes required to constitute "a majority of the [10] circuit judges who [were] in regular active service" within the meaning of Rule 35(a) of the Federal Rules of Appellate Procedure.
>
> * * *
>
> . . . [T]he motion for rehearing is referred to the panel which originally heard the appeal.

On November 3, 1982, the petition for rehearing was denied 2 to 1. Appendix G, *infra*, at 52a.

Petitioner then timely filed with this Court its Petition for a Writ of Certiorari, arguing that in ultimately denying rehearing in banc, the Court of Appeals had decided an important question of federal law that had not been, but should be, settled by this Court. The petition was docketed on January 31, 1983 as No. 82-1288.

On March 21, 1983, this Court entered its order denying the petition. Because no "intervening circumstances of substantial or controlling effect or . . . other substantial grounds not previously presented," Supreme Court Rule 51.2, arose in the 25-day period following that order of denial, petitioner did not file a petition for rehearing of that order. (It was not until July 8, 1983 that the Court of Appeals for the Fourth Circuit rendered its opinion in *Arnold* v. *Eastern Air Lines, Inc.*, 712 F.2d 899 (4th Cir. 1983), the first Court of Appeals decision in direct conflict with the final decision of the Sixth Circuit in this case regarding in banc procedure, and a decision that is the subject of a petition for a writ of certiorari very recently filed with this Court.)

REASONS FOR GRANTING THE WRIT

I. IN RULING THAT A JUDGE DISQUALIFIED TO VOTE ON WHETHER TO REHEAR A CASE IN BANC IS NEVERTHELESS TO BE INCLUDED AS A CIRCUIT JUDGE "IN REGULAR ACTIVE SERVICE" FOR THE PURPOSE OF DETERMINING WHETHER A "MAJORITY OF THE CIRCUIT JUDGES WHO ARE IN REGULAR ACTIVE SERVICE" HAVE VOTED TO REHEAR THE CASE IN BANC, THE COURT OF APPEALS HAS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND HAS BREACHED ITS DUTY, PURSUANT TO THE VOTE TAKEN, TO ACCORD PETITIONER A REHEARING IN BANC. THIS RULING IS ALSO IN DIRECT CONFLICT WITH THE SUBSEQUENT DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT ON THE SAME MATTER, *ARNOLD* v. *EASTERN AIRLINES, INC.*, 712 F.2d 899 (4th Cir. 1983), WHICH IS BEFORE THIS COURT AS THE SUBJECT OF A PETITION FOR A WRIT OF CERTIORARI.

Five times since 1941 this Court has granted certiorari to resolve questions about in banc procedure and the composition of courts sitting in banc.[3]

The fact that this Court has five times reviewed cases involving technical aspects of in banc procedure is indica-

[3] The five cases are: *Textile Mills Corp.* v. *Commissioner*, 314 U.S. 326 (1941), holding that the circuit courts have power to hear or rehear cases in banc; the *Western Pacific Railroad Case*, 345 U.S. 247 (1953), construing the 1948 in banc statute to be a grant of power to the courts to order hearings or rehearings in banc, not the creation of a right in a litigant to such a hearing; *Shenker* v. *Baltimore & Ohio R. Co.*, 374 U.S. 1 (1963), holding that the procedure for handling in banc petitions is a matter of discretion with the circuit courts; *United States* v. *American-Foreign S.S. Corp.*, 363 U.S. 685 (1960), holding that a retired circuit judge is ineligible to participate in a rehearing in banc; and *Moody* v. *Albemarle Paper Co.*, 417 U.S. 622 (1974), holding that senior judges who sat on a case initially are ineligible to vote on the question of whether to grant rehearing in banc.

tive of both the confusion surrounding certain aspects of that procedure and also the importance of in banc hearings. As succinctly noted in one of those decisions, the *Western Pacific Railroad Case*, 345 U.S. 247, 260 (1953),

> [t]he *en banc* power, confirmed by §46(c), is, as we emphasized in the *Textile Mills* case, a necessary and useful power—indeed too useful that we should ever permit a court to ignore the possibilities of its use in cases where its use might be appropriate. If §46(c) is to achieve its fundamental purpose, certain fundamental requirements should be observed by the Courts of Appeals. In the exercise of our *"general power to supervise the administration of justice in the federal courts,"* the responsibility lies with this Court to define these requirements and insure their observance. [Emphasis added; footnotes omitted]

It is submitted that the question concerning disqualified judges presented in this case is as important to the administration of justice as the questions concerning in banc hearings previously decided by this Court.

It is also submitted that the disqualification question presented in this case arises from a latent and as yet unresolved ambiguity in 28 U.S.C. §46(c), the statute authorizing in banc hearings and rehearings. As this Court noted in *Western Pacific*, 345 U.S. at 267, this statute is "not without ambiguity."

28 U.S.C. §46(c) provides:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by *a majority* of the circuit judges of the circuit *who are in regular active service*. A court in banc shall consist of all circuit judges *in regular active service*. [Emphasis added]

The term "in regular active service" appears twice in the statute. Its meaning, which is not defined in the statute, is at the center of the present disqualification controversy

and also at the core of two previous in banc issues decided by this Court. In *American Foreign Steamship Co., supra*, this Court interpreted "regular active service" to exclude senior judges from in banc panels. In *Moody, supra*, the Court interpreted "in regular active service" to exclude senior judges from voting to consider a case in banc. Left undecided in those two cases but squarely presented in this instance is the question of whether a disqualified judge is a judge "in regular active service" for the purpose of determining the majority necessary to order a hearing or rehearing in banc.

There are two compelling reasons why a disqualified judge cannot be counted as a judge "in regular active service" for the purpose of determining the majority required under 28 U.S.C. §46(c).

The first reason is grounded in the mandate that a disqualified judge shall not hear or determine a case. Counting a disqualified judge as a regular active judge for the purpose of determining the majority necessary to grant in banc review may, and in this case, did, result in a disqualified judge determining a case.

This danger is articulated in a commentary, Note, *En Banc Petition–Decisive Presence of a Disqualified Judge*, 47 St. John's L. Rev. 345 (1972), examining the significance of a Second Circuit decision relied upon in the Sixth Circuit's October 22, 1982 reversal of its grant of in banc review, *Zahn* v. *International Paper Co.*, 469 F.2d 1033 (2d Cir. 1972), *aff'd on the merits*, 414 U.S. 291 (1973). In *Zahn*, Chief Judge Friendly had disqualified himself, leaving seven active judges to consider the petition for a rehearing in banc. (The ninth judgeship in the Second Circuit was vacant at the time.) Four of the seven judges voted to rehear the appeal in banc, but the rehearing in banc was, 469 F.2d at 1040,

> . . . denied for want of an affirmative vote "by a majority of the circuit judges of the circuit who are in regular active service."

This led the commentator to observe, 47 St. John's L. Rev. 345, 347-348:

> Had the Chief Judge not disqualified himself the count of the court would have been eight and a majority of five would have been needed to en banc the case. Since four judges voted to en banc, Chief Judge Friendly's vote would have been decisive. A "no" vote would leave a 4-4 tie and the petition would be denied. A "yes" vote would have resulted in a 5-4 [sic] decision to en banc. The decisive-minority's position to include a disqualified judge in the count of the court and thus to require a vote of five to en banc has the effect of equating Chief Judge Friendly's disqualification with a "no" vote. This flies in the face of section 47 of the Judicial Code which provides that "No [disqualified] judge shall hear or *determine* [emphasis added in note] an appeal. . . ." The purpose of this statute is to ensure that the court consist of only impartial judges [citing in a footnote *Moran* v. *Dillingham*, 174 U.S. 153, 157 (1899), involving a predecessor to section 47]. Under predecessor statutes a disqualified judge could cast no vote and if he sat with another judge as a circuit court, the decision of the court was that of the other judge.
>
> If a majority vote were needed to reverse and the disqualified judge were included in the count of the above two-man court, a majority could never be reached and any appeal would have been automatically affirmed. This result was negated by the clear wording of the statute.
>
> By including Chief Judge Friendly in the count of the court, the decisive-minority increased the number of votes needed to en banc as if the Chief Judge had voted against en bancing the case. Such a procedure flies in the face of the clear mandate of the Judicial Code which exempts a disqualified judge from "determining" a case. Upon disqualification, the Chief Judge should have properly been accorded no weight; his vote should have

> been neutralized by reducing the count of the regular active bench to seven and, thus, the four judges who voted for en banc reconsideration of *Zahn* should have carried the day. [Footnotes omitted]

Section 47 of the Judicial Code, 28 U.S.C. §47, the subject of the quoted comment, pertains to the disqualification of a trial judge to hear an appeal from the decision of a case or issue tried by him. Presumably, it is therefore not the basis of the disqualification referred to in the Chief Judge's October 22, 1982 order. However, the parallel policy of mandatory disqualification of a judge under any of the circumstances set forth in 28 U.S.C. §455(b) and "in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C. §455(a), is equally entitled to protection against the erosion of that policy that would be posed by counting a disqualified judge among the judges "in regular active service" for the purposes of 28 U.S.C. §46(c). As this Court noted with respect to a prior disqualification statute, Act 1891, c.517, §3, in *Moran* v. *Dillingham*, 174 U.S. 153, 157 (1899),

> Whatever may be thought of the policy of this enactment, it is not for the judiciary to disregard or to fritter away the positive prohibition of the legislature.

The quoted commentary furnishes additional support for the vigorous dissent of Judge Timbers in *Zahn*, 469 F.2d at 1042:

> . . . I think it is most unfortunate that en banc reconsideration of such a substantial question of unusual importance is being *denied* despite the 4-3 vote by the active judges of this Court *in favor* of en banc reconsideration. . . . Fed. R. App. P. 35(a) authorizes a rehearing en banc only when ordered by a "majority of the circuit judges who are in regular active service." With only eight active judges, when one judge by reason of disqualification is *excluded* from voting whether to en banc but is *included* in determining what constitutes a

> majority, then the rule appears to require five out of seven to en banc the case. Such a result seems to me to be most unfortunate in thwarting the clear intent of the rule. It is especially unfortunate here where the rule operates to permit a *minority* of the active judges of the Court to deny en banc reconsideration of one of the more pressing issues of our day—an issue to which the best thinking of legal scholars, lawyers and judges has been devoted. [Emphasis in original]

Similarly, in the instant case, five of the nine "qualified" active judges in the Sixth Circuit agreed that the issues raised in petitioner's petition for rehearing, which contended that the two-judge opinion of July 29, 1982 is in serious conflict with other decisions of the Sixth Circuit and with controlling Michigan precedent, should have been reconsidered by the court in banc. Yet the presence of one disqualified judge on the court in effect thwarted the will of the majority. Permitting a minority to deny in banc review of this two-judge determination under the circumstances presented in this case frustrates, not serves, the goal of 28 U.S.C. §46(c), as set forth in Judge Mansfield's concurring opinion in *Zahn*, 469 F.2d at 1041:

> . . . [T]o achieve intracircuit uniformity by assuring that where questions of exceptional importance are presented the law of the circuit will be established by the vote of a majority of the full court rather than by a three-judge panel. H.R. Rep. No. 1246, 77th Cong., 1st Sess. (1941); Hearings on S. 1053; before a Subcommittee of the Senate Committee, 77th Cong., 1st Sess. 14-16 (1941).

The second compelling reason for concluding that a disqualified judge should not be counted as a judge "in regular active service" is apparent from the wording of 28 U.S.C. §46(c), when the statute is construed in accordance with the basic rule acknowledged by this Court in *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934):

> . . . "there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 433.

Significantly, the identical phrase, "in regular active service," is used twice within the same statutory provision, 28 U.S.C. §46(c):

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are *in regular active service*. A court in banc shall consist of all circuit judges *in regular active service*. [Emphasis added]

If the disqualification policy of 28 U.S.C. §455(a)-(b) is not to be "frittered away" by the appellate judiciary, it is clear that a disqualified judge is barred from sitting as a member of a "court in banc." Therefore, in the second sentence of 28 U.S.C. §46(c), "in regular active service" must be deemed to include the requirement that the judge not be disqualified under 28 U.S.C. §§455(a)-(b) or other federal disqualification statute. Under the recognized rule of construction, this requirement applies equally to defining "in regular active service" for the purposes of the first sentence of 28 U.S.C. §46(c).

Petitioner submits, as it did in its earlier Petition for a Writ of Certiorari, that the conflict between the federal disqualification statutes and the Sixth Circuit's interpretation of 28 U.S.C. §46 demonstrates the clear error of that interpretation and, consequently, the Sixth Circuit's complete lack of authority to deny—or more precisely, to withdraw its grant of—a rehearing in banc that has received the affirmative vote of 5 of the 9 circuit judges in regular active service who are qualified to participate in the case. In addition, the July 8, 1983 decision of the Court of Appeals for the Fourth Circuit in *Arnold* v. *Eastern Air Lines, Inc.*,

712 F.2d 899 (4th Cir. 1983), has subsequently created a sharply-defined conflict between Courts of Appeals for the Fourth and Sixth Circuits that would have provided "intervening circumstances of substantial or controlling effect" or "other substantial grounds" for rehearing the order denying the Petition for a Writ of Certiorari, Supreme Court Rule 51.2, had the decision been rendered prior to the April 15, 1983 deadline for filing a petition for rehearing.[4]

The per curiam opinion in *Arnold* v. *Eastern Air Lines, Inc.* concludes, 712 F.2d at 901, that:

> The vote of five members *for*, four *against*, and one member *disqualified*, and hence not voting, which had previously taken place, constituted a determination by a majority of the circuit judges who are in regular active service ordering rehearing *en banc*. [Emphasis in original]

The concurring "majority" opinion of Judge Murnaghan in support of this conclusion in large part parallels the arguments made by this petitioner in opposition to the Sixth Circuit's reading of 28 U.S.C. §46(c), and contains an appropriate summation, 712 F.2d at 905, of the most basic flaw in the Sixth Circuit position:

> Since a disqualified judge under [28 U.S.C.] §46(b) is explicitly recognized as unable to sit on a three member panel and since a disqualified judge manifestly, for the reasons heretofore given, cannot sit on an *en banc*

[4] *Arnold* v. *Eastern Air Lines, Inc.*, *supra*, is apparently the first "*decision* of another federal court of appeals," Supreme Court Rule 17.1(a) (emphasis added), in conflict with the Sixth Circuit's interpretation of 28 U.S.C. §46(c). As noted in *Arnold*, 712 F.2d at 903 n.3, the Eighth Circuit has provided by its Local Rule 16(a) that in banc proceedings may be ordered by a majority of the judges in regular active service "who are actively participating in the affairs of the court and who are not disqualified in the particular case or controversy." Similarly, the Ninth Circuit's practice of requiring "affirmative votes . . . by a majority of the . . . active members of the court who are not disqualified from voting" to hear a case in banc, is the subject not of a published decision, but solely of a footnote in a dissent. *Ford Motor Co.* v. *F.T.C.*, 673 F.2d 1008, 1012 n.1 (9th Cir. 1982).

> hearing or rehearing, it would ascribe to Congress a petulant inconsistency, devoid of any apparent explanation, were we to hold that a judge, though disqualified, should be treated as though he were part of the quorum for the purposes of the vote on whether to hear or rehear the case *en banc*.

Judge Murnaghan's opinion also correctly disposes of two arguments raised by Judge Widener in dissent. First, in apparent response to Judge Widener's suggestion, 712 F.2d at 909-910, that this Court's decision in *Shenker, supra*, is a rejection of the rule espoused by the per curiam holding in *Arnold* v. *Eastern Air Lines, Inc.*, Judge Murnaghan points out the critical distinction between the cases, 712 F.2d at 903 n.3:

> Respecting the Third Circuit, we note that *Shenker* was a case from that Circuit where rehearing was held to have failed, when two judges *abstained* and counting them as voting against rehearing resulted in a 4-4 split. The Supreme Court regarded the abstainers as voluntary non-voters, however, and that distinguishes the facts in *Shenker* from those of a case dealing with a disqualified judge who is under a binding compulsion not to vote. [Emphasis in original]

Second, Judge Murnaghan correctly notes, 712 F.2d at 905 n. 11, that the action of the Judicial Conference of the United States in recommending in 1973 an amendment to 28 U.S.C. §46(c) "to make clear that a majority of the judges in regular active service who are entitled to vote should be sufficient to *en banc* a case"—legislation which was never enacted—was at best "inconclusive." In his dissent, 712 F.2d at 911, Judge Widener draws from the failure of Congress to pass such an amendment the inference that:

> . . . Congress, the only body competent to change the statute, was aware of the construction of the statute sought to be changed by the Judicial Conference and chose not to change it.

Petitioner agrees that it may be inferred that Congress chose not to change the statute, but that is a quantum leap from any permissible inference that Congress approves or implicitly adopts the construction placed on the statute by some lower courts. As this Court noted in *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 534 (1947),

> We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation. In short, the original legislative language speaks louder than such judicial action.

Similarly, in *New York* v. *Saper*, 336 U.S. 328, 338-340 (1949), this Court held that an unsuccessful legislative attempt to clarify the Bankruptcy Act by inserting language expressly providing that interest on tax claims against a bankrupt stops at the date of bankruptcy, did not support a rule that such interest continues to run until payment, even in the context of both lower court decisions allowing such post-bankruptcy interest and also the express approval of such an amendment by the Judicial Conference. Reviewing the House Report in favor of such an amendment, this Court reached, 336 U.S. at 340, a conclusion that might very well parallel the Congressional attitude toward 28 U.S. §46(c):

> . . . that the Committee believed, not that the Chandler Act either allowed post-bankruptcy interest or left the matter open, but that the courts in allowing such interest were *ignoring the necessary and intended implications* from the [previously enacted] Chandler amendments. . .. [Emphasis added]

In short, Congressional inactivity with regard to the proposed amendment to 28 U.S.C. §46(c) is perfectly consistent with a Congressional belief that certain courts of appeals, by including a disqualified judge as one "in regular active service" for the purposes of the first sentence of 28 U.S.C. §46(c), were simply ignoring "the necessary and intended implications" of 28 U.S.C. §46(c) and its interrelationship with the federal disqualification statutes.

II. UNDER THE EXCEPTIONAL CIRCUMSTANCES PRESENT IN THIS CASE, ISSUANCE OF A WRIT OF MANDAMUS FROM THIS COURT TO THE CHIEF JUDGE OF THE COURT OF APPEALS WILL BE IN AID OF THIS COURT'S APPELLATE JURISDICTION AND WILL AFFORD PETITIONER ADEQUATE RELIEF THAT CANNOT BE HAD IN ANY OTHER FORM OR FROM ANY OTHER COURT.

Petitioner recognizes that issuance of a writ of mandamus by this Court is "a matter . . . of discretion sparingly exercised," Supreme Court Rule 26, but respectfully submits that the exercise of that discretion in this instance is justified under the three-pronged test of Rule 26.

First, such a writ "will be in aid of the Court's appellate jurisdiction." As this Court observed in *Ex parte Peru*, 318 U.S. 578, 582-583 (1943):

> Under the statutory provisions, the jurisdiction of this Court to issue common-law writs in aid of its appellate jurisdiction has been consistently sustained. The historic use of writs of prohibition and mandamus directed by an appellate to an inferior court has been to exert the revisory appellate power over the inferior court. The writs thus afford an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction, or *of compelling it to exercise its authority when it is its duty to do so.* [Emphasis added]

As discussed previously, when 5 of the 9 circuit judges of a circuit in regular active service who are qualified to participate in a case *vote* to rehear the case in banc, the interplay of 28 U.S.C. §46(c) and the federal disqualification statutes clearly establishes the duty of the court of appeals to rehear the case in banc. This conclusion is in perfect harmony with this Court's observation in *Shenker, supra*, 374 U.S. at 5:

> Although every petition for rehearing is submitted to every member of the court, *a judge is not required to*

> *enter a formal vote on the petition.* Such a procedure is clearly within the scope of the court's discretion as we spoke of it in *Western Pacific*. For this Court to hold otherwise would involve it unnecessarily in the internal administration of the Courts of Appeals. [Emphasis added]

Once a formal vote *is* taken in accordance with whatever procedure a court of appeals follows within the scope of its *discretion*, the court of appeals has the *duty* to exercise its authority in accordance with the outcome of that vote. Although in this case the Court of Appeals for the Sixth Circuit, acting through the Chief Judge, did initially fulfill that duty through the entry of the September 21, 1983 order granting rehearing in banc, the subsequent and erroneous rescission of that order leaves the Court of Appeals in breach of its clear-cut duty. Consequently, a writ of mandamus directed to the Chief Judge of the Court of Appeals for the Sixth Circuit[5] would indeed afford "an expeditious and effective means" of compelling the Court of Appeals to fulfill its duty to exercise its authority in this case by granting a rehearing in banc in accordance with the vote of the judges qualified to vote.[6]

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[5] This Court recognized, in *Western Pacific Railroad Case*, 345 U.S. 247, 259 n.19 (1953), that 28 U.S.C. §46(c) does not require that an order convening the full court be itself issued by the full court: ". . . such an order may be issued by the Chief Judge through the individual action of the necessary circuit judges without the necessity of convening the full court." This appears, from the wording of the September 21, 1982 and October 22, 1982 orders entered in this case (Appendices E and F, respectively, *infra*, at 50a and 51a), to be the practice in the Court of Appeals for the Sixth Circuit. Petitioner therefore prays that the writ issue directly to the Chief Judge.

[6] In discharging a rule to show cause why a district court judge should not be compelled to call two additional federal judges to hear an action in equity for an injunction, this Court, in *Ex parte Williams*, 277 U.S. 267 (1928), ruled that the suit was not within the scope of that provision of the Judicial Code requiring a three-judge panel. Significantly, it recognized, 277 U.S. at 269, that "the appropriate remedy" for a court's improper refusal to convene a three-judge panel is mandamus. Analogously, mandamus is also the appropriate remedy for a Court of Appeals' improper refusal to convene a court in banc for rehearing.

Second, this case presents "exceptional circumstances warranting the exercise of the Court's discretionary powers." As this Court has emphasized, *Western Pacific Railroad Case*, 345 U.S. 247, 260 (1953),

> [t]he *en banc* power, confirmed by §46(c), is . . . a necessary and useful power—*indeed too useful that we should ever permit a court to ignore the possibilities of its use in cases where its use might be appropriate.* [Emphasis added]

In the instant case, the Court of Appeals initially recognized, by a 5-to-4 vote of the qualified judges, both the possibility of using the in banc power and also the appropriateness of its use, a recognition presumably prompted by petitioner's suggestion, in conformity with the Sixth Circuit rule on in banc procedure, that the original panel decision was contrary to other Sixth Circuit decisions and involved questions of exceptional importance. Subsequently, however, the Chief Judge of the Court of Appeals, apparently in misplaced reliance on *Zahn*, *supra*, and other lower court decisions, chose instead to ignore completely the use of the in banc power in a case in which the appropriateness of its use had already been expressly recognized by the majority required under 28 U.S.C. §46(c). This reversal represents an "exceptional circumstance" requiring this Court to act, if it is to honor its commitment, as enunciated in *Western Pacific*, *supra*, to insure the appropriate exercise of the in banc power.

A second "exceptional circumstance" is the decision on this particular "in banc" issue recently rendered in *Arnold* v. *Eastern Air Lines, Inc.*, *supra*, discussed at length in the previous portion of this petition. A petition for certiorari in *Arnold* has been filed with this Court, premised upon, among other grounds, the conflict posed by *Arnold* with the decisions of several Courts of Appeals denying rehearing in banc, including the decision of the Chief Judge of the Court of Appeals for the Sixth Circuit in this case. As noted

previously, no such inter-circuit decisional conflict on this issue existed until the *Arnold* opinion was delivered on July 8, 1983, too late for petitioner to raise such conflict as proper additional grounds for a rehearing of this Court's denial of the petition for writ of certiorari in this case. It is possible that this Court, faced now with such a direct conflict, will chose to grant certiorari in *Arnold* to resolve that conflict and, for the reasons set forth in part I of this argument, rule that a rehearing in banc *is* required if 5 of the 9 circuit judges in regular active service who are qualified to participate in the case vote to rehear the case in banc. In that event, this petitioner and the district court would face the prospect of a trial saddled with the two-judge opinion from the original panel of the Court of Appeals, an opinion that—had the Fourth Circuit decided *Arnold* 84 days earlier, in time for petitioner to raise this significant conflict in a petition for rehearing—would have received the plenary review a "majority" of the qualified judges felt the opinion warranted. Such disparate results from identical votes on the employment of a significant appellate review procedure, the utility of which has been expressly recognized by this Court, cannot be justified by the happenstance that no circuit court decision incorporated petitioner's reasoning until 12 weeks after its time to petition this Court for rehearing had expired.

Third, "adequate relief cannot be had in any other form or from any other court." As previously mentioned, petitioner's time to petition this Court under Rule 51.2 for rehearing of this Court's order denying its petition for writ of certiorari expired 84 days before the *Arnold* decision created the decisional conflict that would have provided grounds for a petition for such rehearing. Any Rule 51 petition is therefore precluded by the stricture of Rule 51.4 that

> . . . petitions for rehearing that are out of time under this Rule, will not be received.

Consequently, issuance of a writ of mandamus from this Court remains the only adequate relief available to petitioner.[7]

[7] Petitioner recognizes that this Court has, on occasion, granted a rehearing "out of time" when "the interests of justice would make unfair the strict application of our rules." *United States* v. *Ohio Power Co.*, 353 U.S. 98, 99 (1957), and would ask this Court, if it is so inclined, to treat this petition for writ of mandamus in the alternative as a motion for leave to file an out-of-time petition for rehearing and accompanying petition. In either event, "adequate relief" can be afforded only by this Court. Even though the Sixth Circuit is among the Courts of Appeals that have recognized their power to recall a mandate, *A to Z Portion Meats, Inc.* v. *N.L.R.B.*, 643 F.2d 390, 392 (6th Cir. 1980), the futility of seeking such a recall prior to this Court's clarification of the in banc issue is underscored in a decision of the First Circuit, *Legate* v. *Maloney*, 348 F.2d 164, 166 (1st Cir. 1965):

> If we were in error in this appraisal, of which we are not presently persuaded, we believe it would be far greater error to permit reconsideration now after denial of petitions for rehearing and certiorari. There must be an end to dispute. If a situation arose, such as a subsequent decision by the Supreme Court, which showed that our original judgment was demonstrably wrong, a motion to recall mandate might be entertained.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that this Court grant its petition for a writ of mandamus to the Honorable Pierce Lively, Chief Judge of the United States Court of Appeals for the Sixth Circuit, as prayed at page 1 of this petition, and that petitioner have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

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Dated: October 4, 1983

APPENDIX

Appendix A
(Filed: July 29, 1982)

APPENDIX A

No. 80-1476
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RUBY CLARK,
Plaintiff-Appellant,

v.

AMERICAN BROADCASTING COMPANIES, INC.,
Defendant-Appellee.

APPEALED from the United States District Court for the Eastern District of Michigan.

Decided and filed July 29, 1982

Before: KEITH and JONES, Circuit Judges, and BROWN, Senior Circuit Judge.

KEITH, Circuit Judge, delivered the opinion of the Court, in which JONES, Circuit Judge joined. BROWN, Senior Circuit Judge, (pp. 20-34) filed a separate dissenting opinion.

KEITH, Circuit Judge. This appeal raises the question of whether summary judgment was providently granted in this defamation action. A judge of the United States District Court for the Eastern District of Michigan granted summary judgment for the American Broadcasting Companies, Inc. ("ABC"), the defendant-appellee. The court held that an ABC broadcast which pictured Ruby Clark, the plaintiff-appellant ("Plaintiff"), was not libelous. We reverse and remand for proceedings consistent with this opinion.

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FACTS

This defamation action arises from an ABC broadcast which aired on April 22, 1977. The broadcast was an hour long "ABC News Closeup" entitled: "Sex for Sale: The Urban Battleground" ("Broadcast"). The Broadcast addressed the effects of the proliferation of commercialized sex: 1) the damage that sex-related businesses have on America's cities, towns, and neighborhoods; 2) the resurgence of street prostitution caused by these sex businesses; and 3) how the sex businesses flourish from prostitution. The Broadcast featured interviews which focused on various cities, including Boston, New York, and Detroit.

Act III focused on street prostitution in these cities. One segment of Act III focused on the devastating effect of street prostitution on a middle class neighborhood in Detroit. Residents of the neighborhood were interviewed, and several women were photographed as they walked down a public street.

The first woman was white. She was obese, and approximately fifty years old. She wore a hat, and carried a shopping bag in each hand. The second woman carried a grocery bag. She was black. The camera followed her a few minutes as she exited a grocery store and walked down the street. She was slightly obese, wore large-framed glasses, and appeared to be at least forty years old. The following comments were made while these two women appeared on the screen:

> According to residents, and Detroit police records, most of the prostitutes' customers or johns were white; the street prostitutes were often black. This integrated middle class neighborhood became a safe meeting place for prostitutes and 'johns'.

The plaintiff, a black woman, was the third women photographed walking down the street. The photographs

were frontal close-ups. Plaintiff's face was clearly visible. The plaintiff appeared to be in her early to mid-twenties. She was attractive, slim, and stylishly dressed. She wore large earrings and had long hair which was pulled up above her head. Apparently, Plaintiff was unaware that she was being photographed. As Plaintiff appeared, the narrator made the following remarks:

> But for black women whose homes were there, the cruising white customers were an especially humiliating experience.

Sheri Madison, a black female resident of the neighborhood plagued by prostitution, appeared on the screen seconds after Plaintiff. She stated:

> Almost any woman who was black and on the street was considered to be a prostitute herself. And was treated like a prostitute.

Subsequently, Plaintiff initiated an action in the Wayne County Circuit Court against ABC claiming defamation and invasion of privacy. She claimed that the Broadcast depicted her as a "common street prostitute". It is uncontroverted that Plaintiff has never been a prostitute. In fact, Plaintiff is married and has one son. ABC removed the case to federal district court pursuant to the court's diversity jurisdiction.

In a deposition, Plaintiff testified concerning her reactions as she, her husband, and 2 year old son viewed the Broadcast. The Broadcast shocked her. Plaintiff believed that she had been portrayed as a prostitute. She also testified that several friends, acquaintances, and relatives phoned Plaintiff during and following the Broadcast. Each of these persons thought that the Broadcast portrayed her as a street prostitute.

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Plaintiff also testified that she was propositioned, that church members shunned her, and that acquaintances confronted her with allegations that she was a prostitute. Moreover, after the Broadcast two potential employers refused to hire Plaintiff because they feared her employment would hurt their businesses.[1]

Both parties moved for summary judgment. In support of its motion, ABC argued that: 1) the audio and visual portions of the Broadcast were clear, unambiguous and not in dispute; 2) the pictures of the Plaintiff walking along a public street were not objectionable; 3) the "context and the words used in conjunction with the brief visual references" to the Plaintiff did not support her claim; and 4) the "balance of the [Broadcast] was not 'of and concerning' [the Plaintiff]." ABC attached to its Motion for Summary Judgment a transcript of the words used in the Broadcast. ABC also provided the court with a videotape of the Broadcast.

In her motion, Plaintiff asserted that: 1) there was no factual question that the defamation was "of and concerning" her; and 2) the Broadcast was not in the public interest, therefore, ABC could not assert a qualified privilege.

ABC filed an Answer to Plaintiff's Cross Motion for Summary Judgment, arguing that: 1) the Plaintiff was clearly and unambiguously depicted as a housewife; and 2) the Broadcast was in the public interest and a qualified privilege existed as a matter of law.

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[1] In addition to Plaintiff's deposition, the parties engaged in other forms of discovery. The parties obtained two sets of interrogatories from each other. Plaintiff deposed Pam Hill, the writer, director, and producer of the Broadcast. Moreover, Plaintiff provided ABC with the names of at least nine individuals who viewed the Broadcast and thought Plaintiff was portrayed as a prostitute. However, these potential witnesses were never deposed.

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After viewing the videotape of the Broadcast and reading the accompanying transcript, the district court granted ABC's motion for summary judgment. Plaintiff perfected this appeal.

I. DEFAMATION CLAIM

On appeal, Plaintiff argues that the district court erred in granting summary judgment for ABC since there existed a factual question as to whether the broadcast was defamatory. We agree.

In granting ABC's motion for summary judgment, the district court concluded that the Broadcast was not libelous. The court reasoned that nothing in Plaintiff's appearance suggested that her activity paralleled that of a street prostitute.[2]

ABC argues that courts must be cautious in allowing juries to decide defamation cases which involve public interest reporting. In effect, ABC suggests that different rules and considerations apply to summary judgment motions in defamation cases. However, the standard for summary judgment motions is articulated clearly in Fed. R. Civ. P. 56(c). Rule 56(c) provides that summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[3]

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[2] The district court did not reach the issue of whether ABC was protected by a qualified privilege. The court did hold, however, that the Broadcast was in the public interest.

[3] Rule 56(c), Fed. R. Civ. P. provides:

Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

"There is no rule which favors either granting or denying motions for summary judgment in defamation cases." *Schultz* v. *Newsweek, Inc.*, 668 F.2d 911 (6th Cir. 1982); *See Yiamouyiannis* v. *Consumers Union of United States*, 619 F.2d 932 (2d Cir), *cert. denied*, 449 U.S. 839 (1980). Therefore, even in defamation cases, summary judgment is proper only if there exists no genuine issue as to any material fact.

In determining whether there exists a genuine issue as to a material fact, we apply the substantive law of Michigan. *See Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). The Michigan Supreme Court in *Nuyen* v. *Slater*, 372 Mich. 654, 127 N.W.2d 369 (1964), defined defamation as follows:

> A communication is defammatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.

Id. at 662.

This definition provides the applicable substantive law in this case.

The district court had a duty to determine as a matter of law whether the Broadcast was reasonably capable of a defamatory interpretation. *Schultz* v. *Reader's Digest Association*, 468 F. Supp. 551, 554 (E.D. Mich. 1979); *Michigan United Conservation Clubs* v. *CBS News*, 485 F. Supp. 893 (W.D. Mich. 1980), *aff'd*, 665 F.2d 110 (6th Cir. 1981). Whether the Broadcast was understood as being defamatory was for the jury to decide. *Schultz* v. *Reader's Digest*, 468 F.Supp. at 554; *Michigan United Conservation Clubs*, 485 F.Supp. at 902.

As noted, the district court granted summary judgment in favor of ABC because the court concluded that the broadcast was not libelous. The district court applied an

incorrect standard. The district court should have granted summary judgment for ABC only if the Broadcast was not reasonably capable of a defamatory meaning. *Schultz* v. *Readers Digest*, 468 F.Supp at 554; *Michigan United Conservation Clubs*, 485 F.Supp. at 902.

The portrayal of Plaintiff as a prostitute would clearly be defamatory under Michigan law. Prostitutes are considered immoral and socially undesirable. Moreover, as the Broadcast indicated, the presence of street prostitution in a neighborhood causes devastating social problems. There is often a significant increase in the number of assaults and robberies. App. 28. Street prostitution is also accompanied by the presence of illegal drug traffic. App. 30. Therefore, the portrayal of an individual as a prostitute would damage her reputation and tend to cause third persons not to associate with that individual.

In this case, Plaintiff's appearance in the Broadcast was capable of at least two interpretations, one defamatory and the other non-defamatory. That the Broadcast is reasonably capable of a non-defamatory meaning is clear from the district court's reasoning. The district court focused solely on whether Plaintiff's behavior during the Broadcast was similar to the stereotypical actions commonly associated with prostitution. This stereotypical behavior includes "[wearing] suggestive clothing, suggestive walking, overt acts of solicitation, and the like." App. 399. Plaintiff was not engaged in any of these actions. Consequently, the court concluded that Plaintiff's appearance in the Broadcast was not libelous.

Plaintiff's participation in the Broadcast is also reasonably capable of a defamatory meaning. The district court should also have viewed Plaintiff's appearance in the context of the focus on street prostitution. Viewed in this

manner, Plaintiff was either portrayed as a prostitute or could reasonably be mistaken for a prostitute.

As noted earlier, Plaintiff was photographed as she walked down the street. Prior to Plaintiff's appearance, the commentator noted that the street prostitutes were often black while their customers were often white. Moreover, the commentator noted that this neighborhood was a safe meeting place for the black street prostitutes and their white customers. As the commentator spoke two women were pictured. The first woman was white. She was obese, at least fifty years old, and carried a shopping bag in each hand. This woman appeareed to be one of the residents of the middleclass neighborhood. The second woman shown was black, slightly obese, wore large-framed glasses, and carried a bag of groceries as she exited a store. Although this woman was black, she also appeared to be one of the residents of the middle class neighborhood. Plaintiff's picture appeared immediately following the appearance of these two matrons.

The contrast between Plaintiff's appearance and that of the two matrons is striking. Plaintiff is black and appeared to be in her early to mid-twenties. She was slim, attractive, stylishly dressed, and wore large earrings. When her appearance is juxtaposed with that of the two matrons, it is not clear whether she is a resident of this middle class neighborhood or one of the street prostitutes who plagued this community. Arguably, this ambiguity is clarified by the commentator's statement that the presence of the cruising white customers was a humiliating experience for the black women who resided in the neighborhood. However, assuming *arguendo* that this statement tends to clarify the ambiguity, this partial clarification is negated by an interview which followed Plaintiff's appearance.

Immediately following Plaintiff's appearance, Sheri Madison, a resident of this neighborhood, appears on the

screen and states: "Almost any black woman on the streets was considered to be a prostitute herself, and was treated as a prostitute." App. 73. Thus, it is unclear whether Plaintiff is one of those middle class women erroneously considered to be a prostitute or is, in fact, a prostitute.

The ambiguity created when Plaintiff's appearance is viewed within the context of Act III's focus on the effect of street prostitution on a Detroit middle class neighborhood renders the Broadcast susceptible to both a defamatory and a non-defamatory meaning.

Given the district court's own analysis of the question of whether the broadcast was defamatory, the court's decision to grant summary judgment for ABC is difficult to reconcile. The district court noted that it had "agonized over [whether the broadcast defamed Plaintiff]." App. 400. The fact that the court found it necessary to agonize over the question of whether the Broadcast was defamatory demonstrates that the case should have been submitted to the jury.

The Broadcast was reasonably capable of two meanings, one defamatory and the other non-defamatory. Consequently, it was for the jury to decide whether the Broadcast was understood as being defamatory. *Schultz* v. *Readers Digest*, 468 F.Supp. at 554; *Michigan United Conservation Club*, 485 F.Supp. at 902. We therefore conclude that summary judgment was improvidently granted.

II. QUALIFIED PRIVILEGE UNDER MICHIGAN LAW

ABC contends that a qualified privilege protects it even if the Broadcast was capable of a defamatory meaning. Michigan's qualified privilege protects a defendant from liability even where the statements published were defamat-

ory. A defendant loses the protection of the qualified privilege, however, if it acts with actual malice as defined in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). *Schultz* v. *Newsweek*, 668 F.2d at 918; *Lawrence* v. *Fox*, 357 Mich. 134, 97 N.W. 2d 719 (1950) In *New York Times* v. *Sullivan*, the Supeme Court held that a defendant acts with actual malice where a statement is made with knowledge that it is false or with reckless disregard of whether it was false or not. *Id.* at 280. The record in the instant case does not indicate that ABC acted with actual malice. Therefore, if Michigan's qualified privilege applies in this case, we could sustain the district court's grant of summary judgment for ABC.

Plaintiff argues that Michigan's qualified privilege does not apply in this case, therefore, she is required to prove only that ABC was negligent.[4]

The parties' contentions raise difficult issues of state and constitutional law. State defamation law is affected by First Amendment principles. *See Schultz* v. *Newsweek*, 668 F.2d at 916; *Orr* v. *Argus Press Co.*, 586 F.2d 1108 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979). Moreover, as a legal and practical matter, the state law issues and the constitutional issues may be intertwined in some situations.

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[4] Plaintiff argues that the *New York Times* v. *Sullivan* standard is not applicable in this case because she is not a "public figure". The Supreme Court has held that the constitutional privilege embodied in the *New York Times* v. *Sullivan* standard is not applicable to private individuals who are not "public figures". *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). The Court in *Gertz* also held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods injurious to a private individual." *Id.* at 347.

In *Schultz* v. *Newsweek, Inc.*, 668 F.2d 911 (6th Cir. 1982), this Court held that Michigan's privilege applies "even though the plaintiff is a private individual". Therefore, if the qualified privilege applies, even a private individual must prove "actual malice" as defined in *New York Times* v. *Sullivan*.

See Orr, 586 F.2d at 1112. We will address the issues arising under Michigan law first, and will reach the constitutional issues only if required to do so. *Cf. Schultz* v. *Newsweek*, 668 F.2d at 916.

The Michigan Supreme Court recognized a qualified privilege to publish defamatory statements in the seminal decision of *Bacon* v. *Michigan Central R. Co.*, 66 Mich. 166, 33 N.W. 181 (1887). In *Bacon*, the court held that the qualified privilege:

> extends to all communications made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty. And the privilege embraces cases where the duty is not a legal one, but where it is a moral or social character of imperfect obligation.

Id. at 170.

Whether the qualified privilege applies is a question of law. *Fortney* v. *Stephan*, 237 Mich. 603, 213 N.W. 172 (1927). "The court must decide as a matter of law whether there is a recognized public or private interest which would justify the utterance of publication". *Schultz* v. *Newsweek*, 668 F.2d at 918.

One privileged occasion involves publications or broadcasts which are in the public interest. The privilege "rests upon considerations of public policy." *Lawrence* v. *Fox*, 357 Mich. at 137. The privilege "varies with the situation [and] with what is regarded as the importance of the social issues at stake." *Id.* at 138. The privilege applies as a matter of law where the plaintiffs' activities or opinions are in the public interest. *Schultz* v. *Newsweek*, 668 F.2d at 918; *Orr* v. *Argus Press*, 586 F.2d at 1108; *Fortney* v.

Stephan, 237 Mich. 603; *Bostetter* v. *Kirsch Co.*, 319 Mich. 547, 30 N.W.2d 276 (1948).

Once a court determines that the occasion is privileged, the court must next determine whether the allegedly defamatory statement is within the scope of the qualified privilege. *Bowerman* v. *Detroit Free Press*, 287 Mich. 443, 447, 283 N.W. 642 (1939). The defendant in *Bowerman* published a newspaper article concerning a judicial proceeding. The article was inaccurate, and contained libelous language. Nevertheless, the defendant argued that there was a qualified privilege to report on judicial proceedings. The court first held that the "extrinsic circumstances in the instant case are that defendant's newspaper was reporting a judicial proceeding which created a qualified privilege." *Id.* at 447. The *Bowerman* court also held that the newspaper article was not within the scope of the qualified privilege. The court reasoned that the privilege did not justify inaccuracies in the published report.

In *Timmis* v. *Bennett*, 352 Mich. 355, 89 N.W.2d 748 (1958), the Michigan Supreme Court adopted the following statement from 33 Am Jur, Libel and Slander, § 126:

> The essential elements of a conditionally privileged communcation may accordingly be enumerated as good faith, an interest to be upheld, *a statement limited in scope to this purpose*, a proper occasion, and publication in a proper manner and to proper parties only.

Id. at 369 (Emphasis added.)

The plaintiff in *Timmis*, a police officer, claimed that statements made concerning the performance of her official duties were defamatory. The court held that the statements were within the scope of the qualified privilege because of the public's interest in law enforcement matters and the actions of members of the police department.

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Judge Lively's opinion in *Schultz* v. *Newsweek*, 668 F.2d 911, is also instructive. In *Schultz*, this Court held that the scope of Michigan's qualified privilege is not a question of fact. In a *Newsweek* article concerning the disappearance of Jimmy Hoffa, the plaintiff was referred to as a "Detroit underworld figure." Four articles which appeared in the *Detroit News* also discussed the plaintiff. Three of these articles concerned the disappearance of Jimmy Hoffa. Schultz was referred to as a "longtime underworld figure" and one of the last two men that Jimmy Hoffa was to have met before his disappearance. The fourth article discussed the problems encountered by Schultz's sons in their attempt to obtain a liquor license. This article stated that Schultz was a key figure in the investigation of Jimmy Hoffa's disappearance.

Schultz brought a libel action in which he conceded that Hoffa's disappearance was a matter of public interest. Nevertheless, Schultz argued that because he was an incidental figure in these articles the scope of Michigan's qualified privilege was a jury question. The defendant publishers argued that the entire report contained in each article was privileged and that there was no issue of scope since Schultz was not a "peripheral" or "incidental" figure. The court rejected Schultz's argument that the scope of the privilege is a matter of fact. The court relied upon *Bowerman* v. *Detroit Free Press*, 287 Mich. 443, and held that the scope of the privilege is a question of law. We agree with the court's holding that the scope of the privilege is to be decided by the court as a question of law.

The qualified privilege does not extend, however, to plaintiffs who are not the focus of the alleged public interest publication. A plaintiff who is merely an incidental figure in the broadcast is not, as a matter of law, within the scope of the privilege. *See Timmis*, 352 Mich. at 369. The policy underlying Michigan's qualified privilege is to promote re-

porting and comment about matters which are in the public interest. *Lawrence* v. *Fox*, 357 Mich. 134. If an individual is involved in some activity or proffers an opinion which is in the public interest, then a news story concerning that individual's activity or opinions is also in the public interest.

The same considerations do not apply where the plaintiff has only the most tenuous connection with the public interest subject matter. A newspaper or television broadcast concerning this incidental plaintiff is not in the public interest. The societal interests which the privilege protects are not furthered by expanding the scope of the privilege to include such individuals. Consequently, the scope of Michigan's qualified privilege does not encompass publications or broadcasts where the plaintiff is not the focus of the public interest publication.

In this case, Act III focused on the devastating effects of street prostitution on a middle-class neighborhood. The activities or opinions of the street prostitutes would clearly be in the public interest. Moreover, the reactions of residents to the street prostitutes is also in the public interest.

Plaintiff's participation in the Broadcast, however, was not in the public interest. There was a nexus between the plaintiff in *Schultz* v. *Newsweek*, 668 F.2d 911, and the subject matter of the articles: the disappearance of Jimmy Hoffa. By contrast, Plaintiff's appearance in the Broadcast had absolutely no connection with the subject matter of the Broadcast, i.e., street prostitution and its effect on a Detroit neighborhood. It is undeniable that Plaintiff was at best an incidental figure in the discussion of street prostitution.[5]

[5] That plaintiff is merely an incidental figure in the Broadcast is also evident from ABC's pleadings in this case. First, in its Answer, ABC claimed as an affirmative defense that "[T]he portions of [t]he news report of which plaintiff complains were not of and concerning her." App. 8. Second, in its summary judgment motion, ABC claimed that "[t]he balance of the news documentary was not 'of and concerning' Plaintiff." App. 33.

Plaintiff was not a prostitute when this segment of the Broadcast was filmed, nor was she one when the Broadcast was aired. In fact, as noted earlier, it is uncontroverted that Plaintiff has never engaged in prostitution or any sex-related business. Moreover, Plaintiff was not a resident of the Detroit neighborhood discussed during Act III. Instead, she resided in Ferndale, Michigan, when she was filmed and when the broadcast was aired. Although show as not a resident of this neighborhood, her reaction to the street prostitutes may have been in the public interest. However, she was not filmed during a protest march against the presence of street prostitutes, nor was she being harrassed by the street prostitutes or the cruising customers. Also, she was not interviewed concerning her reactions to street prostitution. Therefore, her picture as she walked down a public street has absolutely no connection with the subject matter of the Broadcast.

We therefore conclude that Plaintiff's participation in the Broadcast was neither in the public interest nor within the scope of Michigan's qualified privilege as a matter of law.

III. FIRST AMENDMENT PRINCIPLES

Even though Michigan's qualified privilege does not apply in this case, we must determine whether any constitutional principle requires Plaintiff to prove that ABC acted with actual malice as defined in *New York Times* v. *Sullivan*, 376 U.S. 254. For the reasons below, we hold that no constitutional principle requires that Plaintiff prove actual malice.

The Broadcast raises the factual question of whether Plaintiff was depicted as a prostitute or could have reasonably been mistaken for a prostitute. An editorial opinion held by ABC, no matter how pernicious, would be entitled to

First Amendment protection. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

The First Amendment, however, does not afford ABC the same absolute protection for misstatements of fact. "[T]here is no constitutional value in false statements of fact." *Id.* at 340. Nevertheless, the Supreme Court has afforded publishers and broadcasters limited protection from liability in defamation actions. In *New York Times* v. *Sullivan*, 376 U.S. 354, the Supreme Court held that publishers and broadcasters could not be liable in defamation actions brought by public officials unless the publisher or broadcaster acted with actual malice. It is clear that Plaintiff is not a public official.

The Court extended the *New York Times* v. *Sullivan* malice requirement to libel suits brought by public figures. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967). "[Public figures] may recover from injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Gertz*, 418 U.S. at 342. *See Street* v. *National Broadcasting Co.*, 645 F.2d 1227, 1233 (6th Cir.), *cert. granted*, 102 S.Ct. 91, *cert. dismissed*, 102 S.Ct. 667 (1981); *Walker* v. *Cahalan*, 542 F.2d 681, 684 (6th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977). The court in *Gertz* defined "public figures" for purposes of the First and Fourth Amendment as follows:

> For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment. *Gertz*, 418 U.S. at 345.

Plaintiff is not a public figure for all purposes. "Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of [her] life". *Id.* at 352. Plaintiff has no general fame or notoriety. *See Wolston* v. *Reader's Digest Association, Inc.*, 443 U.S. 157 (1979). She also lacks any pervasive involvement in the affairs of society. *See Id.* at 164; *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976).

Plaintiff also cannot reasonably be regarded as a limited public figure. *Gertz* establishes a two-pronged analysis to determine if an individual is a limited public figure. First, a "public controversy" must exist. *Gertz*, 418 U.S. at 345. Second, the nature and extent of the individual's participation in the particular controversy must be ascertained. *Id.* at 352.

The Supreme Court has not clearly defined the elements of a public controversy. In *Time, Inc.* v. *Firestone*, however, the Supreme Court explicitly rejected the defendant publisher's argument that a "public controversy" should be equated with all controversies of interest to the public. The plaintiff in *Firestone* was the wife of a scion of a wealthy industrial family. She and her husband obtained a divorce, but the defendant inaccurately described the grounds for the divorce in an article. The Court held:

> Dissolution of a marriage through judicial proceedings is not the sort of "public controversy" referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public. *Firestone*, 424 U.S. at 454.

In this case, the effects of sex-related businesses in general, and the particular effects of street prostitution on a middleclass Detroit neighborhood, may be the kind of "public controversies" refered to in *Gertz*. The public's interest

in the effects of prostitution in a Detroit neighborhood are arguably greater than the divorce proceedings of a wealthy couple. *Cf. Firestone*, 424 U.S. 448.

Even though the subject matter of the Broadcast may be the type of "public controversy" recognized in *Gertz*, the nature and extent of Plaintiff's participation in this public controversy must still be examined. The nature and extent of an individual's participation is determined by considering three factors: first, the extent to which participation in the controversy is voluntary; second, the extent to which there is access to channels of effective communication in order to counteract false statements; and third, the prominence of the role played in the public controversy. *Gertz*, 418 U.S. at 344-345; *Wolston*, 443 U.S. at 165-168; *Hutchison* v. *Proxmire*, 443 U.S. 111 (1979). See *Wilson* v. *Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir.), *cert. granted*, 102 S.Ct. 500 *cert. dismissed*, 102 S.Ct. 984 (1981); *Street* v. *National Broadcasting Co.*, 645 F.2d at 1234. Applying these three factors to the instant case, we conclude that Plaintiff is not a limited public figure.

First, Plaintiff did not voluntarily participate in the public controversy surrounding the effects of street prostitution on a middleclass neighborhood in Detroit. In *Street* v. *National Broadcasting Co.*, 645 F.2d 1227, this Court held that the plaintiff, the prosecutrix and main witness in the Scottsboro rape trial, was a public figure when she appeared in a play concerning that trial. The plaintiff gave press interviews and aggressively proffered her extra-judicial version of the case. In *Orr* v. *Argus-Press*, this Court held that the Plaintiff was a limited public figure because, *inter alia*, he voluntarily sought publicity.

The instant case is distinguishable from *Street* and *Orr*. Plaintiff never sought to obtain publicity for her actions or opinions. In fact, like the plaintiff in *Wolston*, "[Plaintiff]

was dragged unwillingly into the controversy." *Wolston*, 443 U.S. at 166. Plaintiff was never a prostitute, nor was she engaged in any sex-related business. Moreover, she was not a resident of the Detroit middleclass neighborhood focused on during Act III. Finally, it appears that Plaintiff was unaware that she was being photographed. ABC never requested nor received permission to film Plaintiff or include her picture in the Broadcast.

Second, unlike the plaintiff in *Street*, Plaintiff has no access to channels of effective communication in order to counteract the false statements. Following the Broadcast, the press has not clamored to interview her. *Cf. Street*, 645 F.2d at 1234. Moreover, she does not have the "regular and continuing access to the media that is one of the accouterments of having become a public figure." *Hutchinson*, 443 U.S. at 136. Before Plaintiff's appearance in the Broadcast, she lived in relative obscurity. Her appearance during Act III did not change this fact. Therefore, she did not have any means to effectively contradict the erroneous impression that she was a prostitute.

Finally, as noted previously, Plaintiff played no prominent role in the subject matter which was the focus of Act III. In essence, Plaintiff was merely an incidental figure in the discussion of street prostitution. Therefore, the airing of Plaintiff's picture as she walked down the street was not relevant to any examination of the effects of street prostitution on a Detroit neighborhood.

The nature and extent of Plaintiff's involvement in the subject matter of Act III leads to the inescapable conclusion that she was not a limited public figure. The Supreme Court has refused to extend the actual malice requirement of *New York Times* v. *Sullivan* to plaintiffs who are neither public officials nor public figures. *Gertz*, 418 U.S. 323. Thus, Plaintiff is not required to prove on remand that ABC acted with actual malice.

Appendix A
(Filed: July 29, 1982)

IV. CONCLUSION

We conclude that the Broadcast was capable of a defamatory meaning. Because the Broadcast was susceptible to two interpretations, one defamatory and the other non-defamatory, summary judgment for ABC was improvidently granted. Accordingly, we reverse and remand the case to the district court for proceedings consistent with this opinion.

BAILEY BROWN,* J., Dissenting.

I respectfully dissent. In the first place, after viewing the relevant parts of the documentary several times, I believe that, contrary to the majority opinion, the district court was correct in its determination that the portrayal of Mrs. Clark could not reasonably be construed as defamatory. In the second place, and in any event, I believe that American Broadcasting Companies, Inc. (ABC) enjoyed a qualified privilege under Michigan law.

I.

Act III of ABC's documentary focused on the devastating impact of street prostitution on the neighborhoods bordering Detroit's Woodward Avenue "when sex businesses first proliferated on Woodward Avenue in the early 1970s" and the subsequent struggle that occurred "between the quiet, orderly, middle class people who live here, and some street prostitutes and pimps who tried to move in." App. 70. Act III featured interviews of Woodward Avenue area residents, who describe ' their anguish in witnessing blatant public pandering. These residents described how men would be "accosted" by prostitutes as they walked in the neighborhood with their families, how "the pimps were

* Circuit Judge Brown retired from regular active service under the provisions of 28 U.S.C. § 371(b) on June 16, 1982, and became a Senior Circuit Judge.

matching the johns and the prostitutes," and how "[t]hose who lived in the neighborhood were subject to conduct they considered inconceivable. The rules they lived by no longer applied." App. 71. The focus of the dialogue then turned to the mortifying experiences suffered by neighborhood women who were mistaken for prostitutes:

MRS. CARR:
Whether you're 15 or 45, constantly being approached—it's degrading—feels terrible.

SUE CARR:
You want to, you know, just kill 'em . . . cause it makes you so angry to be placed down to a hooker's level.

HOWARD K. SMITH [Commentator]:
According to residents, and Detroit police records, most of the prostitute's customers or johns were white; the street prostitutes were often black.

This integrated middle class neighborhood became a safe meeting place for prostitutes and "johns."

But for black women whose homes were there, the cruising white customers were an especially humiliating experience.

SHERI MADISON [a black woman]:
Almost any woman who was black and on the street was considered to be a prostitute herself. And was treated like a prostitute.

PAM HILL:
How did that make you feel then?

SHERI MADISON:
Outraged . . . outraged.

Young girls in some cases, high school students were actually approached physically assaulted. Intolerable, absolutely intolerable situations.

App. 72-73.

During this dialogue, three women were photographed in rapid succession as they walked down a street, the last of which was the plaintiff, Mrs. Ruby Clark. The first two women appeared as the commentator, Howard K. Smith, commented: "This integrated middle class neighborhood became a safe meeting place for prostitures and 'johns.' "

District Judge Julian Abele Cook, Jr., who granted summary judgment for ABC, described these two women:

> The first woman was white, elderly with two bags; presumably shopping bags, one in each hand, walking along the street. It was a full length view. The second picture was of a [black] woman who appeared to be in her middle age with a package in her arm, coming out of what appeared to be a store.

App. 398. The appearance of Mrs. Clark came while the commentator next remarked: "But for black women whose homes were there, the cruising white customers were an especially humiliating experience." Mrs. Clark appeared on the screen for three to five seconds, and only her head and shoulders were shown. The district judge then described Mrs. Clark's appearance:

> The third picture was that of Mrs. Clark, the plaintiff, who appeared to be walking on a public street without any visible evidence of anything within her hands and, by contrast to the earlier two women, had earrings and what I may describe, though it may not be accurate, as a reasonably fancy or stylish hair style.

App. 398. Judge Cook also noted that Mrs. Clark "appeared to be fairly well dressed, though not excessively." App. 399.

After Mrs. Clark's libel suit against ABC had progressed through extensive discovery, the parties filed cross-motions for summary judgment. Judge Cook, after viewing the documentary several times, concluded that "[t]here is nothing in [Mrs. Clark's] appearance which would suggest, I think, to the reasonable mind that her activity would, in any way, parallel that of the act of prostitution, as varied as those acts may be," and granted ABC's motion for summary judgment. App. 399-400.

I agree with the majority that the proper standard to be used by the district court for its threshold determination whether a defamation action under Michigan law should be dismissed on summary judgment is "whether the Broadcast [of Mrs. Clark walking down the street] was reasonably capable of a defamatory interpretation." *Ante* at 6. This standard is more fully explained in *Michigan United Conservation Clubs* v. *CBS News*, 485 F.Supp. 893, 902 (W.D. Mich. 1980), *aff'd*, 665 F.2d 110 (6th Cir. 1981) (applying Michigan law):

> It is a well established rule that it is the duty of the court to determine if a communication is capable of bearing a defamatory meaning. *Washington Post Co.* v. *Chaloner*, 250 U.S. 290, 293, 39 S.Ct. 448, 63 L.Ed. 987 (1919); *Commercial Publishing Co.* v. *Smith*, 149 Fed. 704, 706-707 (1907); *Van Lonkhuyzen* v. *Daily News Co.*, 203 Mich. 570, 587-588, 170 N.W. 93 (1918); Restatement (Second) of Torts, § 614 (1977). In making this decision, the court must decide two questions: first, whether the communication is reasonably capable of conveying the particular meaning, or innuendo, ascribed to it by the plaintiff; and second, whether that meaning

> is defamatory in character. Restatement (Second) of Torts, § 614, comment b. If the publication is capable of more than one meaning, and one of these is defamatory, then it is for the jury to determine whether the communication was understood as being defamatory. *Washington Post Co. v. Chaloner, supra*; Restatement (Second) of Torts, § 614(b).

However, the majority, in asserting that "[w]hether the Broadcast was understood as being defamatory was for the jury to decide," *ante* at 6, fails to adequately explain the respective roles of the district court and the jury. "*If* the publication is capable of more than one meaning," an initial determination made as a matter of law by the district court, "*then* it is for the jury to determine whether the communication was understood as being defamatory." *Id.*, 485 F.Supp. at 902 (emphasis added).

The sequence of events in *Michigan United Conservation Clubs* well illustrates the operation of these principles. One of the plaintiffs, Mr. Washington, contended that use of his voice from an unrelated interview during a segment of a CBS broadcast about hunting was defamatory. The district court concluded that no reasonable interpretation of the CBS broadcast would convey a defamatory meaning as to Mr. Washington, and therefore there was no issue to be taken to the jury. Our court, affirming the district court, determined:

> Finally, we agree with the District Court that use of an unattributed tape of Washington's voice as background for a scene of Colorado hunters handling deer carcasses, *was not defamatory as a matter of law* . . . . Under these circumstances, this segment of the film was incapable of conveying or supporting the innuendo that Washington suggests.

665 F.2d 112 (emphasis added).

Mrs. Clark's deposition stated that friends, acquaintances and relatives who watched the program concluded that she was portrayed by it as a prostitute. The majority opinion appears to place some credence on their interpretation of the documentary. However, because the determination whether a publication is reasonably capable of a defamatory meaning is a preliminary *question of law* for the court, it is clear that the hearsay statements in Mrs. Clark's deposition concerning the interpretation of the broadcast by third parties were irrelevant to the district judge's deliberations.

I also disagree with the majority's assertion that Judge Cook "applied an incorrect standard" in granting summary judgment for ABC. The majority complains that Judge Cook "should have granted summary judgment for ABC only if the Broadcast was not reasonably capable of a defamatory meaning." *Ante* at 6. However, the record clearly indicates that that was the standard used by Judge Cook, since he carefully scrutinized "the program to determine if Mrs. Clark, under any reasonable criterion, could be viewed as a prostitute or hooker within the context of the program," and concluded that it was not reasonably capable of being interpreted as portraying Mrs. Clark as a common street prostitute. App. at 400-01.

The majority opinion adopts an unrealistic standard by claiming that because "the court found it necessary to agonize over the question of whether the Broadcast was defamatory . . . the case should have been submitted to the jury." *Ante* at 10. If the majority intends to suggest that summary judgment is precluded anytime a district judge finds it necessary to give sensitive consideration to a plaintiff's allegations, that is a curious standard indeed to provide direction to the trial courts.

Furthermore, I disagree with the majority's conclusion that "[t]he Broadcast was reasonably capable of two mean-

ings, one defamatory and the other non-defamatory." *Ante* at 10. In *Washington Post Co.* v. *Chaloner*, 250 U.S. 290 (1919), the Supreme Court explained the role of a judge in reviewing an allegedly defamatory publication: " 'A publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it. . . . When thus read, if its meaning is so unambiguous as to reasonably bear but one interpretation, it is for the judge to say whether that signification is defamatory or not.' " *Id.* at 293, quoting *Commercial Pub. Co.* v. *Smith*, 149 F. 704, 706-07 (6th Cir. 1907). I believe that when examined in its proper context, Mrs. Clark's appearance on the ABC broadcast unambiguously portrayed her as a middleclass resident of the neighborhood affected by the invasion of the prostitutes, not as one of the prostitutes.

The majority opinion inaccurately contends that the particular segment of the broadcast in which Mrs. Clark appeared had its "focus on street prostitution." *Ante* at 8. Therefore, because the audio portion of the broadcast had earlier noted that "[t]he street prostitutes were often black," the majority takes the unusual position that the appearance of Mrs. Clark, a "slim, attractive, stylishly dressed" black woman wearing large earrings and appearing to be in her early to mid-twenties suggested the possibility that she was a street prostitute.

On the contrary, the theme of this part of ABC's documentary was the invasion by sex-related businesses of this middle-class, integrated Detroit neighborhood and its impact on women in the area who were *not* street prostitutes. Throughout the broadcast, whenever a prostitute was shown, ABC took great pains to convey the message that a prostitute was being portrayed. Such things as suggestive clothing, suggestive walking, or overt acts of solicitation, which the district court correctly determined were not pre-

sent in the case of Mrs. Clark's appearance, were utilized to pinpoint the portrayal of streetwalkers in the earlier segment of the documentary. But the particular segment focusing on the anguish suffered by Woodward Avenue area residents from the influx of prostitution showed no obvious prostitutes. Instead, the women who appeared during this segment of the program were either being interviewed about the problems facing the neighborhood or were shown, as was Mrs. Clark and the other two women, walking in broad daylight on the street. The other two women, who appeared just prior to Mrs. Clark, admittedly were not portrayed by the broadcast as prostitutes. However, the majority opines that the striking contrast between Mrs. Clark and the other two women, whom the majority opinion characterizes as "matrons," makes it unclear "whether [Mrs. Clark] is a resident of this middle class neighborhood or one of the street prostitutes who plagued this community." *Ante* at 9.

Plaintiff, for obvious reasons, is not contending that her appearance alone, in isolation from the broadcast, could reasonably be construed as giving viewers the impression she is a prostitute.[1] Indeed, after viewing the film, I am in total agreement with Judge Cook that there is nothing about Mrs. Clark's appearance that would convey to the reasonable mind the impression that she was a common street prostitute. It is obvious from viewing the film that Mrs. Clark was one of the "quiet, orderly, middle class people" who lived in the neighborhood, not one of the "street prostitutes" trying to move in. Nor is it contended that Mrs. Clark's race reasonably led to the innuendo that she was a prostitute, because although the commentator had remarked that the "street prostitutes were often black," he had also noted the dilemmas faced by non-prostitute black

[1] Indeed, it would be anomalous to hold ABC liable for the impression of its viewers that Mrs. Clark was a prostitute if that interpretation were directly attributable to the way that she appeared while being photographed.

women in the neighborhood facing harassment from the "cruising white customers." The woman immediately preceding Mrs. Clark's appearance was also black; however, all are in agreement that she was not portrayed as a prostitute.

The majority concludes that the erroneous impression that Mrs. Clark was a prostitute arises when her appearance was juxtaposed with the appearance of the two "matrons." However, Mrs. Clark's appearance was entirely consistent with a middle class background, and her age in comparison with the two women preceding her appearance was not a reasonable distinguishing basis for concluding she was a prostitute while the other two women were middle class residents of the neighborhood.

The majority contends that the defamatory impression that Mrs. Clark was a prostitute was amplified by the audio comments of the documentary at the time of Mrs. Clark's brief appearance on the screen and the comments immediately following her appearance by Sheri Madison, a black female resident of the neighborhood who was interviewed concerning the "invasion." Those comments were as follows:

> But for the black women whose home were there, the cruising white customers were an especially humiliating experience. [Sheri Maidson's remarks:] Almost any woman who was black and on the street was considered to be a prostitute herself and was treated like a prostitute.

Prior to this point in the documentary, the focus had switched from the street prostitutes themselves to the incidental effects of the street prostitution invasion. Mrs. Clark's appearance can only be reasonably capable of the interpretation that she was a member of that group of middle class black women in the neighborhood who were

subject to being accosted by "johns" looking for prostitutes among the women in the neighborhood. It is unrealistic to conclude that, because ABC indicated that Mrs. Clark's presence on the street could subject her to the humiliating experience of being mistaken for a prostitute, viewers of the program could also reasonably mistake Mrs. Clark's portrayal as being that of a common street prostitute.

II.

Although I would affirm the district court solely on the basis that the ABC broadcast was not reasonably capable of a defamatory interpretation, I am constrained to comment on the majority's statements concerning the application of Michigan law with respect to qualified privilege. If the Michigan qualified privilege, which assumes that the broadcast was defamatory, applies to the documentary, there would be no liability for the broadcast because there was no showing that ABC knowingly or recklessly defamed Mrs. Clark. Indeed, there has been no contention that ABC ever intended for Mrs. Clark's appearance to be given the interpretation that she is a prostitute.

The majority has correctly noted that the applicability of the Michigan qualified privilege to publish allegedly defamatory statements is a question of law for the courts to determine, as is the proper scope of the qualified privilege. However, the majority opinion takes the stance that ABC did not properly limit the scope of its documentary to the purpose of communicating the concerns of Woodward Avenue area residents about the distressing invasion of street prostitution when it included Mrs. Clark in the broadcast. Consequently, the majority concludes that the Michigan qualified privilege does not apply because "the scope of Michigan's qualified privilege does not encompass publications or broadcasts where the plaintiff is not the focus of

the public interest publication." *Ante* at 16. However, Michigan law does not countenance such a narrow view of the qualified privilege. A fair reading of Michigan law indicates that the appearance of an individual in a public interest documentary is within the scope of a qualified privilege attaching to that documentary as long as the individual has a reasonable connection with the subject matter of the documentary. The ABC documentary illustrated the impact on the women in an entire neighborhood from the invasion of the sex-related businesses. Because Mrs. Clark was part of this broad category of neighborhood women who were subject to the humiliation of misidentification as a prostitute, her appearance was within the scope of the qualified privilege.

In *Timmis* v. *Bennett*, 352 Mich. 355, 89 N.W.2d 748 (1958), the plaintiff, a policewoman, alleged that she had been defamed by an attorney's letter inquiring about plaintiff's efforts to have the attorney's client declared mentally incompetent. The Michigan Supreme Court determined that a communication is privileged if made by a party having "a moral or social duty" to make the communication and directed to a "person having a corresponding interest or duty." The Court then held:

> The essential elements of a conditionally privileged communication may accordingly be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any narrow limits.

89 N.W.2d at 755. In addressing the scope of the privilege, the Court first determined that the purpose of the letter was

to inquire about the activities of Kalamazoo law enforcement officials. Since the Court assumed that the public welfare embraced concerns about law enforcement, it determined that "the doctrine of qualified privilege may properly be regarded as including statements made in good faith by a citizen of a community having, or claiming to have, special knowledge or information bearing on such matter of public concern and communicated to others concerned or interested." *Id. See also, Nuyen* v. *Slater*, 372 Mich. 654, 127 N.W.2d 369 (1964); *and Bufalino* v. *Maxon Brothers, Inc.*, 368 Mich. 140, 117 N.W.2d 150 (1962).

It is not disputed that ABC has an "interest" or "duty" to communicate to its viewers the concerns about the effects of street prostitution on the residents of surrounding residential areas in Detroit, nor is it disputed that ABC's viewers have a corresponding "interest" in receiving that information. *Orr* v. *Argus-Press Co.*, 586 F.2d 1108, 1113 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979) (applying Michigan law) ("Everyone, citizen or reporter, has the right to comment on matters of public importance . . . ."). There is no contention that ABC broadcast its documentary in bad faith, or that its publication of the broadcast was in any way improper.

The case of *Lawrence* v. *Fox*, 357 Mich. 134, 97 N.W.2d 719 (1959), is also highly instructive. *Lawrence* indicates that the threat of libel, which could "chill" the vigilance of the press, led to Michigan's adoption of the defense of privilege for certain publications. However, the privilege is not a constant, but operates on a continuum from "no privilege" for loose gossip to "absolute privilege" for judicial and legislative utterances. Public policy considerations "of lesser intensity" than those for absolute privilege would cause a limited, qualified privilege to be applied. 97 N.W.2d at 721. *Lawrence*, citing *Bowerman* v. *Detroit Free Press*, 287 Mich. 443, 283 N.W. 642 (1939),

determined that the external circumstances or occasion of the communication, not the actual words used, would determine the scope of the privilege. The Michigan Supreme Court concluded: "[I]t is for the court to determine whether or not the exernal circumstances surrounding the publication are such as to give rise to a privileged occasion." 97 N.W.2d at 722.

This court in *Schultz* v. *Newsweek, Inc.*, 668 F.2d 911 (6th Cir. 1982) (Applying Michigan law) concluded:

> The court must decide as a matter of law whether there is a recognized public or private interest which would justify the utterance or publication. The privilege attaches to reports on matters of general public interest even though the plaintiff is a private individual.

Id. at 918. Similarly, the district court opinion that was affirmed in *Schultz* v. *Newsweek, Inc.*, reported at 481 F.Supp. 881 (E.D. Mich. 1979) and authored by now Circuit Judge Kennedy, stated that "[u]nder Michigan law, there is a qualified privilege to publish information which is in the public interest," *id.* at 884, and implied that the entire article comprising the communication is within the scope of the privilege as long as the communication does not stray into discussing areas of concern not within the reasonable limits of the public interest.

In *Schultz* v. *Reader's Digest Ass'n*, 468 F.Supp. 551 (E.D. Mich. 1979) (Freeman, J.) (applying Michigan law),[2]

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[2] There are two cases from the United States District Court for the Eastern District of Michigan involving Leonard Schultz. The Newsweek litigation, *Schultz* v. *Newsweek, Inc.*, 481 F.Supp. 881 (E.D. Mich. 1979) (Kennedy, J.), *aff'd*, 668 F.2d 911 (6th Cir. 1982), addressed news articles about Schultz's involvement in attempts by his sons to obtain a state liquor license as well as Schultz's alleged connection with the disappearance of Jimmy Hoffa. The Reader's Digest case, *Schultz* v. *Reader's Digest Ass'n*, 468 F.Supp. 551 (E.D. Mich. 1979) (Freeman, J.) was concerned only with a publication about the Hoffa controversy.

plaintiff argued that the qualified privilege did not apply because he was an incidental figure in news stories concerning the disappearance of Jimmy Hoffa. Again, the court indicated that the "scope" of the qualified privilege is determined by the subject matter of the communication, in this case "the question of who Hoffa was to meet on the day he disappeared," and not necessarily the persons discussed in the articles themselves:

> [T]he Court is of the opinion that an article involving a matter of public concern is subject to a qualified privilege under Michigan law. Although there can be no dispute that the article in question involved a matter of public concern, the plaintiff contends that the qualified privilege should not be applied to him because he was not a central figure in the Hoffa disappearance. Whatever role Schultz played in this matter, it is clear to the Court that the question of who Hoffa was to meet on the day he disappeared was and is an important matter of public concern.

Id. at 562.

The majority opinion seems to concede that the impact of street prostitution on surrounding residential neighborhoods is in the public interest.[3] Therefore, the majority apparently would concur that the examination of this dilemma by ABC's documentary was in the public interest and subject to a qualified privilege as a general proposition. However, the majority opinion contends that Mrs. Clark's particular appearance on the program is not within the public interest focus of the documentary because "plaintiff has only the most tenuous connection with the public interest subject matter." *Ante* at 16. The majority concludes

[3] Judge Cook, although he did not reach the qualified privilege issue in granting summary judgment, did conclude "that the broadcast was of public interest." App. 396.

that "plaintiff is not the focus of the public interest publication" because plaintiff has never been a prostitute, she was not a resident of the neighborhood being invaded by the sex-related businesses and she was not interviewed about her reactions to the street prostitution; accordingly, "her picture as she walked down a public street has absolutely no connection with the subject matter of the Broadcast." *Ante* at 18.

However, as previously noted, Michigan case law focuses on the general subject matter of a communication in determining if the qualified privilege applies. In this connection, it is undeniable that the subject matter of this portion of the ABC documentary was the impact of the invasion of sex-related businesses on the female residents of this integrated middle class Detroit neighborhood who were forced to run the risk of being mistaken for prostitutes and possible solicitation by using the public sidewalks in their neighborhoods. It defies reality to contend that Mrs. Clark's appearance in the neighborhood of the sex businesses on Woodward Avenue, which would potentially subject her to the same abuse and harassment that the documentary was addressing, was so unrelated to the subject matter of the broadcast as to make her an "incidental figure" with "no connection" with the broadcast. *See ante* at 17.

The majority has made the unsupported contention that, since Mrs. Clark was a resident of Ferndale, Michigan, she was not a resident of the neighborhoods blighted by the invasion of the sex businesses, and consequently the abuse suffered by women in those neighborhoods was not a problem peculiar to her. However, the majority opinion neglects to note that Woodward Avenue intersects Ferndale, Michigan, which is a suburb bordering the city of Detroit. The record adequately demonstrates that, although Mrs. Clark claims she did not frequent the immediate vicinity of the sex businesses, their location was not far from her home.

Appendix A
(Filed: July 29, 1982)

Mrs. Clark's appearance in the ABC documentary should be subject to the Michigan qualified privilege because the subject matter of the documentary was in the public interest and her appearance bore a reasonable relationship to that general subject matter.

CONCLUSION

In conclusion, I am persuaded that Judge Cook did not err in determining that Mrs. Clark's appearance in the broadcast could not reasonably be construed as portraying her as a common street prostitute. I also conclude that in any event, even assuming that Mrs. Clark's appearance could be interpreted as defamatory, Michigan's qualified privilege should be applied to this portion of the documentary, which did not exceed the bounds of the public interest subject matter of the documentary. While under current precedents it appears that the First Amendment is not implicated, it appears to me that the majority's disposition of this case will make the filming of television documentaries unduly risky and therefore the majority's disposition is not in the public interest.

Appendix B
(Rendered: May 16, 1980)

APPENDIX B

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RUBY CLARK,
Plaintiff

-vs-

AMERICAN BROADCASTING CO.,
Defendant

Civil Action No.
78-71116

IRA W. BRENEMAN, JR.,
Plaintiff

-vs-

AMERICAN BROADCASTING CO.,
Defendant

Civil Action No.
77-71646

OPINION AND RULING OF THE COURT ON MOTIONS FOR SUMMARY JUDGMENT

EXCERPTS from proceedings had in the above-entitled causes before the Honorable JULIAN ABELE COOK, JR., U.S. District Court Judge, 277 Federal Building, Detroit, Michigan on Friday, May 16, 1980.

APPEARANCES:

Victoria Heldman, Esq.,
On Behalf of Each Plaintiff

Richard E. Rassel, Esq.,
On Behalf of the Defendant

Cheryl E. Warren, CSR
Official Court Reporter

Appendix B
(Rendered: May 16, 1980)

FRIDAY, MAY 16, 1980
DETROIT, MICHIGAN

* * *

(Prior argument by Counsel were held in open Court, stenographically recorded but not ordered transcribed.)

COURT: Before me at the present time are Motions for Summary Judgment which have been filed by the Defendant, American Broadcasting Companies, Incorporated and Commercial Credit, Incorporated and by the Plaintiffs, Ira W. Breneman, Jr. and Ruby Clark, respectively.

I should point out that I have already ruled upon the involvement of the Plaintiff's Impact Promotions, Incorporated, who has joined in the lawsuit and in this Motion with the Plaintiff, Ira W. Breneman, Jr.

To reiterate, the Defendant moved for the dismissal of Impact Promotions, Incorporated. That Motion was not contested by the Plaintiff, Ira Breneman. This Court has, accordingly, dismissed the Impact Promotions, Incorporated as a party to the Breneman v A.B.C., et al litigation.

The issue as to costs, which was sought by American Broadcasting Companies has been reserved with the directive that the Defendant, through its attorneys, submit a listing of proposed costs with a copy being forwarded contemporaneously to the Counsel for the Plaintiff. Counsel for the Plaintiff will have a like period of time; namely, ten (10) days in which to respond to the issue of costs.

I said then and I say now that ruling regarding costs is not indicative of any opinion I may have with respect to whether or not I will or will not assess costs in connection with this dismissal.

I would ask Mr. Rassel to assume the responsibility for the preparation of that order.

Appendix B
(Rendered: May 16, 1980)

The Motions for Summary Judgment were filed with this Court in the early months of 1980; specifically, the Breneman Motion for Summary Judgement was filed on January 23, 1980 and the Clark Motion was filed in the following month, on February 25, 1980. The cases have similarities and dissimilarities. The similarities, without contest, relate to the publication of a film on television over the A.B.C. network of a program entitled "Sex for Sale, the Urban Battle." The program lasted, exclusive of commercials, for approximately 50 minutes.

I viewed the film in its entirety yesterday. The program dealt with the subject of prostitution and dealt with the issue and focused it's attention on two cities; namely, New York and Detroit. It is the Detroit portion of the film about which the Plaintiffs, Clark and Breneman, take issue. More specifically, it is the contention of the Plaintiffs in their complaints that the Defendants injured them by means of libel and invasion of privacy. The Defendants have denied the substantive allegations of the complainants by their responsive pleadings. Thus, the case was placed at issue subsequent to that time. A substantial amount of discovery has followed.

I'm of the opinion that the broadcast was of public interest. I shall attempt to deal with each case individually. First, the Clark case; that is, Ruby Clark v American Broadcasting.

The area in which Mrs. Clark was a participant involved the second quarter of the program which has been identified by transcript as Act Two. Act Two dealt primarily with the City of Detroit and, more specifically, dealt with the efforts, in part, of citizens within the Woodward Avenue area to curb and to combat the prostitution activity, as well as the incidental crime which was brought about by the presence of prostitution in that area.

The film, in its entirety, including Act Two, pictured persons who were identified as prostitutes. The film also

carried statements made by persons within the neighborhood who expressed their anger and frustration and their efforts to fight the blight caused by the sex for sale business in their community. There were also frequent conversations with persons in law enforcement as well as in the psychological science, all of whom talked and discussed the subject of prostitution.

The Defendants contend that neither the audio nor the video portion of the program, which dealt with Miss Clark and/or Mr. Breneman, fall within the category of being libelous or an invasion of their respective privacy.

As I indicated, while there are some similarities, there are some dissimilarities. The narrator of the program, Howard K. Smith, in Act Two, spoke as follows:" According to residents and Detroit police records, most of the prostitutes' customers are Johns who are white. The street prostitutes were often Black.

This integrated, middle-class neighborhood became a safe meeting place for prostitutes and Johns, but, for Black women whose homes were there, the cruising white customers were especially a humiliating experience." It was during the last sentence that I have just read: to wit, quote, but for Black women whose homes were there, the crusing white customers were especially humiliating experience, end of quote, that Mrs. Clark's picture appeared. Immediately preceding Mrs. Clarks appearance on television were the appearances of two women. The first woman was white, elderly with two bags; presumably shopping bags, one in each hand, walking along the street. It was a full length view. The second picture was of a woman who appeared to be in her middle age with a package in her arm, coming out of what appeared to be a store. The third picture was that of Mrs. Clark, the Plaintiff, who appeared to be walking on a public street without any visible evi-

dence of anything within her hands and, by contrast to the earlier two women, had earrings and what I may describe, though it may not be accurate, as a reasonably fancy or stylish hair style.

I viewed this portion of the film several times; I could estimate 3 to 4 to 5 times in an effort to review the scene and to put it in the context of Act Two and, even more particularly, the entire program. I have also viewed this film, as well as, let me strike that. I have viewed Mrs. Clark's participation in the film, as well as Mr. Breneman's participation in the film with a backdrop of the law pertaining to libel and invasion of privacy.

I should point out for the record that neither Mrs. Clark nor Mr. Breneman were consulted on their participation in this program and their participation was without their authority and, presumably, without their knowledge.

It is with the backdrop of the law pertaining to this particular case, or strike that. The question that I ask of myself when I viewed the film and when I read the—and heard the language uttered by Mr. Smith, the narrator, was, one, was the act of which Miss Clark complains in any way suggestive that her activity was that which one may normally associate with that of being a prostitute; i.e., suggestive clothing, suggestive walking, overt acts of solicitation and the like? The picture showed a reasonably close-up of Mrs. Clark who, I neglected to mention, appeared to be fairly well-dressed, though not excessively.

There is nothing in her appearance which would suggest, I think, to the reasonable mind that her activity would, in any way, parallel that of the act of prostitution, as varied as those acts may be. Thus, I saw nothing offensive; I saw nothing libelous and I saw no invasion of privacy in the act of Mrs. Clark by ABC.

I also read and reread the transcript and especially the narrow portion which focused on Mrs. Clark. I find those to be equally as innocuous.

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I have also attempted to put the two together; that is, the video along with the audio, to determine if, collectively, either in the narrow sense or in the broad sense that a viewer could or would associate Mrs. Clark as being a prostitute. Things that would work in her favor, in my judgment, insofar as this program is concerned, appear to be as follows: One, that she was Black; Two, that she is a woman, and, Three, that she was reasonably well-dressed and, Four, that her appearance by contrast with the two ladies that preceded here may possibly have suggested that she, Mrs. Clark, was not part of that integrated middle-class neighborhood, but was, in fact, one of the intruders into the neighborhood who sought illicit trade.

I must confess that I have agonized over this because I have attempted to place myself as a viewer looking at the program to determine if Mrs. Clark, under any reasonable criterion, could be viewed as a prostitute or hooker within the context of the program and within the context of the subject matter that was then before the screen. I have agonized on that because, from my own personal experiences as a trial counsel, having both lived and worked in a neighborhood where people who only sought to do an honest day's job, were thought of as or solicited to be women of the street, found themselves in, and the whole experience to be quote humiliating or, as one of the participants on the program said to be outrageous. But, from a legal viewpoint, I cannot find any justifiable basis to deny the Defendant's Motion. I think in any reasonable context, that the Ruby Clark effort in this case must fall and I do that with sensitivity of understanding why Mrs. Clark has brought the lawsuit.

Thus, it is the conclusion of this Court that the Motion for Summary Judgment as to American Broadcasting Companies in the Ruby Clark case shall be and is granted.

As to Ira Breneman, Jr. or Mr. Breneman's participation occurred in Act Three of the Program. I'm sorry, I believe that's Act Four.

The language, or, rather, the emphasis of that portion of the Program dealt with the relationship between males and females and the reasons why men seek to involve themselves in prostitution.

I think that it is well that this Court might refer to the transcript of that Program which led up to and included Mr. Brememan's participation in the Program.

> "HOWARD K. SMITH: Some say that the prostitute's customer is seeking not only sexual variety, but protection of a threatened sexual identity as well.
>
> JENNIFER JAMES: The new sexual freedom is having an opposite effect of prostitution than we would have expected. Because it puts so much pressure on the male to perform and to satisfy the female. And one of the few ways he has of relieving that pressure is paying a woman not to point out that there's anything wrong with the way he performs.
>
> HOWARD K. SMITH: Psychiatrists say mastery and power over women has always been a reason why men visit prostitutes. Today, that reason may take on increased importance.
>
> PAM HILL: How much is power at issue in this relationship?
>
> FORMER NEW YORK CITY PROSTITUTE: I think on a scale from one to ten it would be about nine. Just the power of dominating the female. Usually, he cannot dominate his wife.
>
> DR. CHRISTINA MILNER: The value system with the males having the most power to the exclusion of women will seek out prostitutes to kind of recapture the old social system."

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It was preceding and during the Milner statement that Mr. Breneman's picture was shown as he left a restaurant and walked along the street. The camera made a close-up of Mr. Breneman and, as he has been pointed out by Miss Heldman, Counsel for the Plaintiff, that Mr. Breneman had a big or what appeared to be a big cigar in his mouth as he walked along the street. The activity of Mr. Breneman walking along the street was clearly an innocent one and, most clearly, Dr. Milner did not make any specific reference to Mr. Breneman. However, unlike the Clark scenario, I'm of the belief that the context in which Mr. Breneman's picture was shown was such that it clearly suggested to the viewing audience that the person who is depicted in that film, in this particular instance Mr. Breneman, was one of the persons who was the kind of individual about whom Mr. Smith, Miss James, Miss Hill, former New York City prostitute, and Dr. Milner made reference.

Most clearly, as in the Clark and Breneman situations, no specific reference was made to either of them by name; no specific accusation was made to either of them that they had participated or were about to participate in the illegal or illicit activity.

It is the opinion of the Court that the Motion for Summary Judgment filed by the Defendants in this case with respect to the Plaintiff, Ira B. Breneman, shall be and is denied.

There is also a motion before me—I might point out too that with respect to the Motion for Summary Judgment which had been presented on behalf of Clark and Breneman that those motions are denied. With respect to the issue relating to amendment of the pleadings, I do not see any allegations which deal with an intentional infliction of emotional distress. There is reference in paragraph 13(d) or 13(f) of the Breneman complaint which deals with negligence and may, in some way, suggest that there was negligent infliction of emotional distress. It is unclear to me, and it is quite obvious it was unclear to the Defendants, that this was the contention of the Plaintiff.

Appendix B
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Although this case is now much older than I would like it to be, having been filed with this Court on July 5, 1977, I will grant the Plaintiff's motion to amend. The amended complaint must be filed with this Court within 20 days from this date. Should the Plaintiff fail to do so within that period of time, this Court will then deny the request by the Plaintiff Breneman to amend. The amendment, I should add, shall be limited to the issue of negligent infliction of emotional distress.

I believe that that completes the issues which are before the Court. I would ask Mr. Rassel to prepare the order which grants the American Broadcasting Companies Cross Motion for Summary Judgment as to Clark. Miss Heldman, I would ask you to prepare the order which denies A.B.'s Cross Motion as to Plaintiff Breneman. And, Also, I would ask you to prepare an order which will grant your request to amend the pleading in this particular case.

MISS HELDMAN: Your Honor, I have a point of clarification on the amendment issue. Is it the Court's determination that the Breneman complaint does currently state a cause of action for libel and false light invasion of privacy or does the Court want a total amendment?

COURT: No, I'm sorry. As I understand it, that in order for false light allegations to be made, there must be some other evidence of a tort and, on the basis that I have determined that there is no judicial issue before the Court as to Clark, it would seem that that must fail.

MISS HELDMAN: I was talking about Breneman, Your Honor.

COURT: Oh, yes. Do you have any response, Mr. Rassel to that?

MR. RASSEL: I don't believe that false light invasion, that false light is alleged. I don't understand it.

COURT: Is there a false light allegation in the complaint?

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MISS HELDMAN: I alleged in terms saying that Ira Breneman was falsely depicted, so forth and so on. I do not put my complaint in terms of counts. If the Court is granting my motion to amend, I would suggest that I make that clear that those are my legal theories, defamation, false light and the others. I understand my intentional emotional counts were denied.

COURT: All right, I will grant that request, but, of course, in granting it, I'm not making a ruling as to the viability of that issue. But, yes, I will grant it.

* * *

CERTIFICATE

I, CHERYL E. WARREN, after being first duly sworn, say that I stenographically recorded the foregoing Excerpts from proceedings had in the above-entitled causes and that I personally reduced to these typewritten pages those portions of my stenographic notes and that this transcripts [sic] constitutes a true and accurate account of those proceedings to the best of my knowledge and belief.

(s) Cheryl E. Warren,
CSR
Official Court Reporter

DATED: May 30, 1980

[In reproducing this Appendix, typographical errors in the May 30, 1980 transcript have been corrected in accordance with the corrections made in the September 10, 1980 transcript of the complete May 16, 1980 proceedings, as incorporated in the Joint Appendix filed in the Court of Appeals.]

Appendix C
(Filed: May 30, 1980)

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RUBY CLARK,
Plaintiff,

NO. 8-71116

vs.

HON. JULIAN A. COOK, JR.

AMERICAN BROADCASTING COMPANIES, INC., a New York corporation,
Defendant.

ORDER

At a session of said Court held in the Federal Building, in the City of Detroit, County of Wayne, State of Michigan, on May 30, 1980.

PRESENT: Honorable Julian A. Cook, Jr.,
U. S. District Court Judge

Defendant, AMERICAN BROADCASTING COMPANIES, INC., having moved for Summary Judgment in the above-entitled cause;

Plaintiff, RUBY CLARK, having filed her Cross-Motion for Summary Judgment; and

The Court having read the pleadings and briefs of the parties and viewed the matter broadcast, and having heard oral argument thereon and dictated its Opinion on the record:

IT IS ORDERED that Defendant's Motion for Summary Judgment is hereby granted and Plaintiff's Complaint is dismissed with prejudice and without costs; and

Appendix C
(Filed: May 30, 1980)

IT IS FURTHER ORDERED that Plaintiff's Cross-Motion for Summary Judgment is denied.

(s) Julian Abele Cook, Jr.
U. S. District Court Judge

APPROVED AS TO FORM:
SCHADEN & HELDMAN
BY: (s) Victoria C. Heldman, Esq.
Attorneys for Plaintiff

BUTZEL, LONG, GUST, KLEIN & VAN ZILE
BY: Richard E. Rassell, Esq.
Attorneys for Defendant

Appendix D
(Filed: July 29, 1982)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 80-1476

RUBY CLARK,
Plaintiff-Appellant,

vs.

AMERICAN BROADCASTING COMPANIES, INC.,
Defendant-Appellee.

Before: KEITH and JONES, Circuit Judges, and BROWN, Senior Circuit Judge.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded for further proceedings consistent with the opinion of this Court.

It is further ordered that Plaintiff-Appellant recover from Defendant-Appellee the costs on appeal as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman, *Clerk*
A True Copy.

Appendix D
(Filed: July 29, 1982)

Attest:
(s) Linda L. Brinson
Deputy, Clerk

Issued as Mandate: November 11, 1982
COSTS: NONE

Filing Fee	$
Printing	$
Total	$

Appendix E
(Filed: September 21, 1982)

APPENDIX E

No. 80-1476
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RUBY CLARK,
Plaintiff-Appellant,

v.

AMERICAN BROADCASTING COMPANIES, INC.,
Defendant-Appellee.

ORDER

A majority of the Judges of this Court in regular service have voted for rehearing of this case en banc. Sixth Circuit Rule 14 provides as follows:

> The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this Court, to stay the mandate and to restore the case on the docket as a pending appeal.

Accordingly, it is ORDERED that the previous decision and judgment of this Court is vacated, issuance of the mandate is stayed and this case is restored to the docket as a pending appeal.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman, *Clerk*

Appendix F
(Filed: October 22, 1982)

APPENDIX F

80-1476

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RUBY CLARK
Plaintiff-Appellant

vs.

AMERICAN BROADCASTING COMPANIES, INC.
Defendant-Appellee

ORDER

On September 21, 1982 by order of the Chief Judge of the Circuit you were advised that the motion for rehearing en banc in the above-styled case had been granted. The Chief Judge has now directed me to advise that his ruling was made in error and that in fact the 5-4 vote (one active judge being disqualified) failed to attain the 6 affirmative votes required to constitute "a majority of the [10] circuit judges who [were] in regular active service" within the meaning of Rule 35(a) of the Federal Rules of Appellate Procedure. See also *Zahn* v. *International*, 469 F.2d 1033 (2d Cir. 1972), *aff'd. on the merits*, 414 U.S. 291 (1973); *Boraas* v. *Village of Bell Terre*, 476 F.2d 806 (2d Cir. 1973), *rev'd on the merits*, 416 U.S. 1 (1974) (rehearing en banc denied though four judges of the eight member court favored it); *International Business Machine Corp.* v. *United States*, 480 F.2d 293 (2d Cir. 1973); *Boyd* v. *Lefrak Organization*, 517 F.2d 918 (2d Cir. 1975); *United States* v. *Martorano*, 620 F.2d 912 (1st Cir.), *cert. denied*, 449 U.S. 952 (1980).

The briefing schedule is therefore cancelled and the motion for rehearing is referred to the panel which originally heard the appeal.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman
Clerk

Appendix G
(Filed: November 3, 1982)

APPENDIX G

80-1476
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RUBY CLARK,
Plaintiff-Appellant,

v.

AMERICAN BROADCASTING COMPANIES, INC.,
Defendant-Appellee,

BEFORE: KEITH and JONES, Circuit Judges and BROWN, Senior Circuit Judge.

ORDER DENYING
PETITION FOR REHEARING

A majority of the judges of the Court having not favored rehearing en banc, the petition for rehearing has been referred to the hearing panel for disposition.

Judge Brown would grant the petition to rehear for the reasons set out in his dissent to the majority opinion.

Upon consideration, the Court concludes that the petition for rehearing is without merit. Accordingly, it is ORDERED that rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman
Clerk

APPENDIX H

28 U.S.C. §455(b):

He [any justice, judge, or magistrate of the United States] shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

No. 83-576

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

In re AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner

(ON PETITION FOR A WRIT OF MANDAMUS TO THE HONORABLE PIERCE LIVELY, CHIEF JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT)

BRIEF IN OPPOSITION OF RUBY CLARK, AN INTERESTED PARTY

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COUNTER-STATEMENT OF QUESTION PRESENTED

MAY A WRIT OF MANDAMUS ISSUE FROM THIS COURT TO COMPEL A DISCRETIONARY ACT OF THE COURT OF APPEALS, OR TO COMPEL A STATUTORY CONSTRUCTION, OR TO RESOLVE A MATTER OF INTERLOCUTORY APPEAL?

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REASONS FOR DENYING THE WRIT

A WRIT OF MANDAMUS SHOULD NOT ISSUE FROM THIS COURT TO COMPEL A DISCRETIONARY ACT OF THE COURT OF APPEALS, NOR TO COMPEL A STATUTORY CONSTRUCTION, NOR TO RESOLVE A MATTER OF INTERLOCUTORY APPEAL.

Petitioner has not supported its burden of showing the exceptional circumstances amounting to judicial usurpation of power which must be present to justify the invocation of the extraordinary remedy of a Writ of Mandamus to the Sixth Circuit Court of Appeals. *Kerr* v *United States*, 426 US 394 (1976).

On numerous occasions, this Court has held that a Writ of Mandamus will issue only where the duty to be performed is ministerial and the obligation to act is peremptory and plainly defined. *U.S. ex. rel. McLellan* v *Wilbur*, 283 US 414 (1931). Mandamus will not issue to compel a discretionary act: the law must not only authorize the demanded action, but require it. 283 US at 420. Mandamus is not employed to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken. *Wilbur* v *US*, 281 US 206, 218 (1930).

The act complained of by petitioner was a discretionary act of the Sixth Circuit Court of Appeals. As this Court held in *Western Pacific Railroad Case*, 345 US 247 (1953) a rehearing *en banc* is not a right of a litigant, but is a grant of discretionary power to the Circuit Courts of Appeals. 345 US at 259. Not only is the act of granting a rehearing *en banc* discretionary, but the procedure employed by the Court of Appeals in ordering a rehearing *en banc* is a matter of Circuit Court administration. Each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how to exercise its power of *en banc* rehearing. 345 US at 259. For this court to hold otherwise would involve it unnecessarily in the internal administration of the Courts of Appeals. This Court rejected such involvement in

Shenker v *Baltimore & Ohio Railroad Co*, 374 US 1, 5 (1963). Mandamus will not issue to compel the Sixth Circuit Court of Appeals to exercise its discretion in ordering a rehearing *en banc*, nor to compel the Sixth Circuit Court of Appeals to adopt a particular procedure in administering its power to order a rehearing *en banc*. On this basis alone, petitioner's application for Writ of Mandamus must be denied.

However, the facts of this case present a number of other reasons which require a denial of the petition for Writ of Mandamus, and each is briefly discussed below.

A Writ of Mandamus will not issue to compel a particular statutory construction. The duty sought to be enforced must be plainly described and must not rely upon statutory construction. *Wilbur* v *US*, *supra*, 281 US at 219.

Petitioner's application must be denied when it asks this Court to order the Sixth Circuit Court of Appeals to adopt a particular construction of 28 USC 46(c). The Sixth Circuit's construction of 28 USC 46(c) is reasonable and is not an abuse of power. In fact, the Sixth Circuit's procedure for exercising its *en banc* power is consistent with the plain language of 28 USC 46(c) and has been followed by other circuits. *See*, e.g., *Porter County Chapter of the Izaak Walton League of America, Inc* v *Atomic Energy Commission*, 515 F2d 513 (7th Cir, 1975); *Ford Motor Co* v *Federal Trade Commission*, 673 F2d 1008 (9th Cir, 1982).

This court has expressly refused to require unanimity of internal administrative procedures of the circuit courts in exercising their *en banc* power. *Shenker* v *Baltimore & Ohio Railroad Co*, *supra*. The procedure adopted by the Fourth Circuit in *Arnold* v *Eastern Air Lines*, 712 F2d 899 (1983) may be permissibly unique to the Fourth Circuit. This will be decided by Petition for Certiorari filed in that case. In any event, that court's procedure is not binding on the Sixth Circuit, nor does it present an impermissible "conflict amoung the circuits". In fact, the Fourth Circuit

noted in its opinion that its procedure for ordering *en banc* rehearings may change in the future. 712 F2d at 902.

The variation in interpretation and construction of 28 USC 46(c) between the Fourth Circuit on the one hand and the Sixth, Seventh and Ninth Circuits on the other hand pointed out by petitioner in its application, in fact precludes the issuance of a Writ of Mandamus since the right sought to be enforced is not clear and peremptory.

Finally, this Court has repeatedly held that a Writ of Mandamus will not be granted as a substitute for appeal. Ruby Clark filed her Complaint for defamation against petitioner on April 19, 1978. She has yet to have her trial on the merits. On November 11, 1982, the Sixth Circuit ordered this case to a jury trial. All appeals for rehearing and for certiorari to this Court have been from the interlocutory order of the Sixth Circuit. Petitioner may yet prevail on the merits and its claims of error then will be moot. However, if Ruby Clark prevails on the merits, petitioner still has all rights of appeal from such a final judgment.

Writs of Mandamus against judges are drastic and extraordinary writs which should be resorted to only where appeal is a clearly inadequate remedy. This court will not use them as substitutes for appeals. *Ex Parte Fahey*, 332 US 258, 259-260 (1947). It has been Congress' determination since the Judiciary Act of 1789 that, as a general rule, appellate review should be postponed until after final judgment has been rendered by the trial court. A judicial readiness to issue the Writ of Mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress. *Kerr* v *United States*, *supra*, 426 US at 403. Even if the trial and final judgment may take several months, this court will nevertheless require such a final judgment and reject the "piecemeal" appeals raised by petitions for issuance of a Writ of Mandamus. *Roche* v *Evaporated Milk Association*, 319 US 21 (1943).

Nor will the Writ of Mandamus be used by this court to control interlocutory orders in the conduct of judicial proceedings. The fact that the result of the litigation may possibly be such that the interlocutory proceedings taken may not prove of value is not a sufficient reason for calling the writ into use—even where the interlocutory order cannot be reversed on error or on appeal. *Ex Parte Wagner*, 249 US 465, 471 (1919).

CONCLUSION

Petitioner seeks, at most, substitution of this court's judgment for that of the Sixth Circuit in the Sixth's Circuit's exercise of its *en banc* power.

The Writ of Mandamus may not issue to direct the exercise of the Sixth Circuit's discretion. Nor may the writ issue to compel a particular statutory construction, nor as a substitute for appeal.

The case has yet to be submitted for a decision on the merits and for final judgment. Ruby Clark respectfully requests this Court deny the Petition for Writ of Mandamus.

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